80-110

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABDALLAH W. TAMARI, LUDWIG W. TAMARI AND FARAH W. TAMARI, CO-PARTNERS DOING BUSINESS AS WAHBE TAMARI & SONS CO.,

Plaintiffs-Petitioners,

vs.

BACHE HALSEY STUART, INC. (FORMERLY BACHE & CO., INCORPORATED), A DELAWARE CORPORATION,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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QUESTIONS PRESENTED.

1. Whether a complaint states a claim for which relief can be granted under Section 10 of the Arbitration Act, 9 U. S. C. § 10, and the doctrine of "evident partiality" when it is alleged that a vice president and witness for one party secretly negotiated employment with the firm of which an arbitrator was vice president, contemporaneously with arbitration hearings, even though the arbitrator withdrew before the award was entered.
2. Whether a complaint states a claim for which relief can be granted under Section 10 of the Arbitration Act, 9 U. S. C. § 10, and the doctrine of "evident partiality" when it is alleged that the agreement to arbitrate was coerced and involuntary and it appears that the arbitrators who decided the validity of the agreement were members of an industry that required the signing of pre-dispute arbitration agreements as a condition of doing business.
3. Whether, on a motion to dismiss an action under Section 10 of the Arbitration Act, 9 U. S. C. § 10, for failure to state a claim for which relief can be granted, the courts below could make factual determinations adverse to the plaintiff, based upon the record of the arbitration, when the complaint alleged "evident partiality" of the arbitrators arising out of relationships between a party, the arbitrators and the arbitration forum which were not fully disclosed in the record of the arbitration.

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BACHE HALSEY STUART, INC. (FORMERLY BACHE & CO., INCORPORATED), A DELAWARE CORPORATION,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Abdallah W. Tamari, Ludwig W. Tamari, and Farah W. Tamari, co-partners doing business as Wahbe Tamari & Sons Co. (hereinafter referred to as "Tamaris"), respectfully pray that a writ of certiorari be issued to review the decision in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Tamari* v. *Bache Halsey Stuart, Inc.*, 619 F. 2d 1196 (7th Cir., 1980) and is set forth herein as Appendix A. The unpublished "Judgment Order" entered by the United States District Court for the Northern District of Illinois on February 26, 1979, dismissing the Tamaris' complaint to vacate an arbitration award, is set forth herein as Appendix B. The accompanying unpublished "Memorandum Opinion" of the District Court, dated February 26, 1979, is set forth herein as Appendix C. The unpublished order of the District Court confirming the arbitration award, dated April 10, 1979, is set forth as Appendix D. The unpublished "Memorandum Opinion" of the District Court denying the Tamaris' motion to reconsider, dated August 3, 1979, is set forth herein as Appendix E.

JURISDICTION.

The court of appeals entered its judgment April 25, 1980. This Court has jurisdiction of this cause under 28 U. S. C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fifth Amendment to the United States Constitution, U. S. Const. Amend. V, provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .."

Section 10 of the Federal Arbitration Act, 9 U. S. C. § 10, provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

The pertinent provisions of Rule 12(b)(6) of the Federal Rules of Civil Procedure are as follows:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading

thereto . . ., except that the following defenses may . . . be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . .. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT.

The complaint in this case (set forth in Appendix F) was brought pursuant to Section 10 of the United States Arbitration Act, 9 U. S. C. § 10, to vacate an arbitration award entered against the petitioners and in favor of the respondent, Bache Halsey Stuart, Inc. (hereinafter referred to as "Bache"). The District Court for the Northern District of Illinois dismissed the complaint for failure to state a claim upon which relief can be granted, without holding an evidentiary hearing or permitting discovery. Judgment was entered in favor of Bache on its counterclaim seeking confirmation of the arbitration award. The Court of Appeals for the Seventh Circuit affirmed.

The arbitration proceedings involved a dispute between the petitioners and Bache arising out of the trading of commodity futures. The petitioners, citizens and residents of Lebanon, had opened two commodity futures trading accounts with the respondent through Bache's Lebanese subsidiary, Bache & Co. (Lebanon) S. A. L. (hereafter referred to as "Bache Lebanon"). The pre-printed form customer agreements, executed in 1972, contained an arbitration clause which provided that any controversy arising out of or related to the accounts would be settled by arbitration according to the rules of the American Arbitration Association or the exchange on which the transaction took place. Appendix F, ¶¶ 2, 7, and 8.

A dispute arose over the handling of the two commodity accounts in late 1973. On January 9, 1974, Bache Delaware served notice upon the Tamaris demanding arbitration of a dispute concerning an alleged $376,366.96 indebtedness arising out of commodity futures trading. The notice also required that the Tamaris select the arbitration forum within five days; otherwise, Bache would select the forum. These demands were

made pursuant to the Bache customer's agreement forms. Appendix F, ¶ 9.

The Tamaris replied to the notice and, in conformity with the customer's agreement forms, requested that the Chicago Board of Trade (hereinafter referred to as the "CBOT") be the arbitration forum. The reply also requested that the arbitration proceedings include the Tamaris' counterclaim for $2,115,000.00 which they had paid to Bache and Bache Lebanon. In February, 1974, Bache filed a complaint against the Tamaris with the Arbitration Committee of the CBOT. As a result, the parties executed a submission agreement for arbitration before the Arbitration Committee of the CBOT on April 27, 1974. Appendix F, ¶¶ 10, 11, 12.

The Arbitration Committee first met to consider the matter in October, 1975. In the meanwhile, the Commodity Futures Trading Commission Act of 1974 had become effective on April 21, 1975, 7 U. S. C. § 1 *et seq.*, which contained a provision regulating arbitration proceedings by contract markets such as the CBOT.[1] As a result of doubt over the meaning and application of that section, the Arbitration Committee decided to proceed only after the parties signed a waiver of any objection to the jurisdiction of the committee, but tentatively scheduled the first hearing for December 11, 1975, pending receipt of signed waiver forms provided by the committee. Appendix F, Complaint ¶¶ 16-20.

On December 9, 1975, the Tamaris' counsel advised the Arbitration Committee of the Tamaris' refusal to execute the waiver and further advised that it was the Tamaris' intention to seek relief in court. A suit was filed by the Tamaris the following day (Appendix F, ¶¶ 21 and 22) in the United States District Court for the Northern District of Illinois against Bache and Bache Lebanon for damages for fraud and mishandling of their

1. Section 5a(11) of the Commodity Futures Trading Commission Act, 7 U. S. C. § 7a(11).

accounts. Appendix F, ¶¶ 21, 22. The Opinion of the Court of Appeals refers to this action in footnote 1 to its Opinion as "*Tamari I*."

On December 11, 1975, the Arbitration Committee met and advised the Tamaris' counsel for the first time that execution of the above-referenced waivers was no longer required and, further, that the Committee would proceed immediately, over the Tamaris' objection, to take evidence. Appendix F, ¶¶ 25-30.

Prior to the next arbitration hearing, which was held on January 7, 1976, the Tamaris filed a second action in the District Court asking for declaratory and injunctive relief halting the arbitration proceeding. This action is referred to by the Court below as "*Tamari II*." Over the continuing objection of the Tamaris, additional arbitration hearings were conducted on January 7, 14 and 26; February 11 and 12 ; March 2 and 9; April 7 and 8; and May 17, 1976. Appendix F, ¶ 31. On May 19, 1976, the District Court dismissed Bache as a party from *Tamari I* and dismissed *Tamari II* for failure to state a claim upon which relief could be granted. No evidentiary hearing had been held. Petitioners appealed the dismissal of *Tamari II*. The District Court was affirmed. *Tamari* v. *Bache & Co.*, 565 F. 2d 1194 (7th Cir. 1977), *cert. denied*, 435 U. S. 905 (1978).

Contemporaneously with the arbitration hearings, and unknown to the Tamaris, there developed a relationship between Mr. Ralph Klopfenstein, an arbitrator, and Mr. Robert Fivian, a Bache vice president and officer who testified at arbitration hearings on behalf of Bache. That relationship developed as follows: Mr. Klopfenstein was employed as a vice president of Heinold Commodities, Inc. (hereinafter to be referred to as "Heinold"); a management executive search company, acting on behalf of Heinold, began negotiating with Mr. Fivian in December, 1975, or early January, 1976; at the end of January, 1976, Mr. Fivian was advised that Heinold was seeking him as a vice president, and from the end of January, 1976, until

the middle of March, 1976, Mr. Fivian negotiated directly with Heinold management; on March 17, 1976, Mr. Fivian agreed to become a Heinold vice president "working in administration," a position similar to that of Mr. Klopfenstein; on March 29, 1976, Mr. Fivian informed Bache of his new employment; and on April 7, 1976, the Tamaris were informed of the relationship for the first time. Appendix A, pp. 3-4.

Prior to the disclosure of the relationship on April 7, 1976, there had been eight arbitration hearings conducted, at all of which Mr. Klopfenstein was in attendance. Mr. Fivian was present on behalf of Bache on February 11, 1976; February 12, 1976; March 2, 1976; and March 9, 1976. He testified at each of these hearings except the March 2nd hearing. Mr. Fivian had not yet completed his testimony as of April 7, 1976.

At the April 7, 1976 hearing, the chairman of the CBOT arbitration committee announced Mr. Fivian's change of employment and stated that Mr. Klopfenstein was willing to withdraw from the committee if there was objection to his remaining on the panel. The Tamaris objected to Mr. Klopfenstein's remaining on the panel and moved to disqualify the entire panel on the basis that the ongoing secret discussions between the Heinold firm and Mr. Fivian had tainted the proceedings and rulings of the arbitration panel, in which Mr. Klopfenstein had participated fully. The motion was denied on April 8, 1976. The Tamaris withdrew from the arbitration at the next hearing on May 17, 1976.[2]

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2. Between April 7, 1976 and May 17, 1976, the Tamaris also learned facts which led them to conclude that the individual makeup of the arbitration panel was in violation of the rules of the CBOT. Subsequent to their withdrawal on May 17, 1976, the Tamaris filed a second declaratory judgment action alleging that the panel was not properly constituted and could not make a valid award. The dismissal of this action, referred to by the Court below as *"Tamari III,"* was affirmed on the ground that the arbitrators were immune from

(Footnote continued on next page.)

The arbitrators rendered an award in favor of Bache on June 21, 1976, which award was affirmed January 25, 1977, on appeal to the CBOT Appeals Committee. Appendix F, ¶¶ 59, 60.

The instant lawsuit was filed January 27, 1977 to vacate the arbitration awards pursuant to 9 U. S. C. § 10. Jurisdiction was based on 28 U. S. C. §§ 1331(a), 1332, 1337, and 1350. Bache filed a motion to dismiss the complaint and a counterclaim to confirm the arbitration award June 21, 1978. The complaint was dismissed February 26, 1979 (Appendices B and C), the counterclaim granted April 10, 1979 (Appendix D), and a rehearing was denied August 3, 1979. Appendix E. The Court of Appeals affirmed the District Court on April 25, 1980.

(Footnote continued from preceding page.)
such challenge and the question of composition of the panel could only be raised after an award in an action under Section 10 of the United States Arbitration Act, Tamari v. Conrad, 552 F. 2d 778 (7th Cir. 1977).

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS CONTRARY TO THIS COURT'S DECISION IN COMMONWEALTH COATINGS CORP. v. CONTINENTAL CASUALTY CO., 393 U. S. 145 (1968), AND ESTABLISHES A CONFLICT IN THE CIRCUITS AS TO THE STANDARD TO BE APPLIED IN DETERMINING WHETHER AN ARBITRATION AWARD MUST BE VACATED FOR "EVIDENT PARTIALITY."

Section 10(b) of the United States Arbitration Act, 9 U. S. C. § 10(b), provides that a court may vacate an arbitration award "[w]here there was evident partiality or corruption in the arbitrators, or either of them." In *Commonwealth Coatings Corporation* v. *Continental Casualty Company*, 393 U. S. 145 (1968), this Court interpreted that section as evidencing a "desire of Congress to provide not merely for *any* arbitration but for an impartial one." *Id.* at 147. In that case, a subcontractor and a prime contractor arbitrated a dispute before three arbitrators. Each party chose one arbitrator, which arbitrators selected a third, "neutral" arbitrator. The third arbitrator, unknown to the subcontractor, had, for some four or five years prior to the arbitration, engaged in business dealings with the prime contractor. This Court described those dealings as "sporadic," and found that there had been no dealings between the arbitrator and the party for approximately a year prior to the arbitration. *Id.* at 146. This Court, nevertheless, held that the award should be vacated because the facts were sufficient to create an appearance of bias.

In so holding, this Court relied on the premise that "any tribunal permitted by law to try cases and controversies not

only must be unbiased but also must avoid even the appearance of bias." *Id.* at 150. Furthermore, this Court said:

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.

Id. at 149.

The application of this Court's ruling as it relates to proof of actual prejudice was analyzed by the court in *Overseas Private Investment Corp.* v. *Anaconda Co.*, 418 F. Supp. 107, 110 (D. C. D. C. 1976).

> The Court's holding in *Commonwealth Coatings* is somewhat analogous to a *per se* rule insofar as it does not require a judge to probe the mind of an arbitrator, once it is established that the arbitrator actually knew of facts which could impair his judgment. This rule merely recognizes that courts are unable to determine with any great degree of accuracy the subjective impact of knowledge on the human mind. Thus, when the record shows that an arbitrator knew of potentially prejudicial information, the court cannot conclude that there was not actual bias, and the issue must be resolved by use of a *per se* rule, or irrebutable presumption, expressing a policy judgment.

The plaintiff's burden is to show "facts which would raise doubt about the fairness of an arbitration in the mind of a reasonable man." *Id.* at 110.

In *Sanko S. S. Co. Ltd.* v. *Cook Industries, Inc.*, 352 F. Supp. 386 (S. D. N. Y. 1972), the Disrict Court confirmed an arbitration award in favor of Cook Industries and against Sanko. After the arbitration, Sanko alleged that one of the arbitrators had failed to disclose that the firm of which he was president was a subsidiary or affiliate of a French partnership. The partnership and Cook were competitors, but there were also occa-

sional transactions between them. Sanko also alleged a prior relationship between Cook's attorney and the arbitrator's employer. The District Court held that the undisclosed relationships alleged were insubstantial. *Id.* at 390-91.

The Court of Appeals for the Second Circuit reversed and remanded the case for an evidentiary hearing. *Sanko S. S. Co. Ltd.* v. *Cook Industries, Inc.*, 495 F. 2d 1260 (2d Cir. 1973). The Second Circuit did not consider the allegations insubstantial. Concerning the potential relationship to Cook through his employer, the Court speculated that "Besman [the arbitrator] might have had some interest in reaching a decision favorable to Cook, if only to lay the groundwork for a return favor to Dreyfus from Cook in the future." *Id.* at 1262. Both as to that relationship, and the relationship through the attorney for Cook, the reviewing court ruled that the District Judge failed to consider the circumstances in the light most favorable to Sanko. The Court added:

> If the relationship between Besman and Cook Industries through the Dreyfus partnership is as substantial as Sanko alleges on the basis of its present information, even though the relationship is not as direct as the dealings between the prime contractor and one of the arbitrators in *Commonwealth Coatings* and is of a different nature, the district court might still find that it could have raised doubts concerning Besman's impartiality and should have been revealed.

Id. at 1264, n. 3.

In this case, the Court of Appeals for the Seventh Circuit articulated and applied the following standard, which is at odds with this Court's holding in *Commonwealth Coatings* and which undermines the rationale upon which it was decided:

> In setting aside an award for bias, the "guiding principle" is:
>
> > The interest or bias of an arbitrator must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative.

> *United States Wrestling Federation* v. *Wrestling Division of the AAU, Inc.*, 605 F. 2d 313, 318 (7th Cir. 1979) (quoting *Lucke* v. *Spiegel*, 314 Ill.App.2d 532, 536, 266 N.E.2d 504, 508 (1970). *We think this principle applies whether actual bias or merely an appearance of bias is charged.*

Slip Opinion at 7. (Emphasis added.)

If the facts of *Commonwealth Coatings* had been analyzed pursuant to the test used by the court below, the result would have been different. The arbitrator in *Commonwealth Coatings* was not charged with bias. His interest in the outcome was not direct, as he could not anticipate gain resulting directly from his decision. His interest was not definite, as he had not even worked for the prime contractor in the previous year, and his relationship had always been sporadic. His interest, if any, was not capable of demonstration. The existence of actual bias was merely speculative. Similarly, the result in the court below conflicts with the holding of the Second Circuit in *Sanko*.

The petitioners submit that the failure to follow the principle of *Commonwealth Coatings* has resulted in the court below erroneously deciding two issues: (A) whether the participation in a substantial portion of the proceedings by an arbitrator whose firm was negotiating the employment of one party's vice president and witness constituted evident partiality; and (B) whether evident partiality existed with respect to the arbitrators' decision that petitioners submitted to arbitration voluntarily.

A. The Employment Negotiations.

The petitioners alleged that one of the arbitrators, Mr. Klopfenstein, had an undisclosed relationship with a Bache vice president and witness, Mr. Fivian, contemporaneously with arbitration hearings. The arbitrator's firm, of which he was a vice president, negotiated for many weeks to hire Mr. Fivian from Bache at the same time that Mr. Fivian was testifying before Mr. Klopfenstein and the other arbitrators. During this time,

procedural decisions were made which substantially affected the course of the arbitration. This relationship was not disclosed until the fact of Mr. Fivian's joining Mr. Klopfenstein's firm as vice president was about to be accomplished. He had not yet finished his testimony when the disclosure was made. The petitioners submit that, had the negotiations continued beyond the completion of the arbitration or had they broken off, the negotiations would not have been disclosed and Mr. Klopfenstein would have remained on the panel and participated in the award.

The ties between Messrs. Klopfenstein and Fivian were substantial and contemporaneous with the arbitration proceedings. Clearly, the ties as alleged between Mr. Klopfenstein and Bache were more direct and less speculative than the ties between the arbitrator and the party in *Sanko*. Moreover, the "interest" or "bias" in this case was no more remote, uncertain, or speculative than that in *Commonwealth Coatings*. However, the standard applied by the court below abandons the premise of this Court's decision, namely, that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp.* v. *Continental Casualty Co., supra* at 150.

B. The Issue of Voluntariness.

The petitioners contended that the submission of their dispute with Bache to arbitration was not voluntary and was coerced by the pre-dispute arbitration clause in customer agreements, which constituted contracts of adhesion. The petitioners' designation of the CBOT as an arbitration forum was in response to the demand of Bache, served upon them in Lebanon, that they elect a forum in five days. They signed a submission agreement as a result of Bache's filing a complaint against them with the CBOT Arbitration Committee. They attended the arbitration hearings, which began December 11, 1975, only after they had filed suit against Bache in the United States District Court for

the Northern District of Illinois on the underlying dispute, *Tamari I*, and after seeking declaratory and injunctive relief to terminate the arbitration proceedings, *Tamari II*.

The court below found: "The CBOT arbitration panel determined that it had jurisdiction to hear the dispute because the Tamaris had voluntarily submitted it to them." Appendix A, p. 10. The petitioners submit that evident partiality existed with respect to that decision. The nature of that evident partiality is clear from the history of CFTC Regulation 180.3, 17 C. F. R. § 180.3 (1976).

The Commodity Futures Trading Commission Act, which became effective April 21, 1975, required that arbitration proceedings conducted pursuant to the Act be voluntary.[3] On August 11, 1975, the CFTC first proposed as Rule § 200.3 a regulation which banned the use of pre-dispute arbitration clauses.[4] The Commission amended the proposed rules on November 24, 1975.[5] The notice accompanying the amended proposed rule [redesignated 180.3] included the following:

> The Commission does not believe that a waiver of this right should be allowed through customer account agreements signed at the time an account is opened. Such agreements may be contracts of adhesion and the customer's waiver may not be an informed decision, since the claim or grievance will not generally arise until some time in the future.
>
> * * *
>
> As already noted, one factor leading to passage of the CFTC Act was allegations made in court cases and newspaper articles that the arbitration procedures of contract markets had been unfairly applied. The Commission be-

3. 7 U. S. C. § 7a(11).

4. 40 Fed. Reg. 34152 (1975), Com. Fut. L. Rptr. (CCH) ¶ 20,068.

5. 40 Fed. Reg. 54430 (1975), Com. Fut. L. Rptr. (CCH) ¶ 20,111.

> lieves that the procedural protections contained in the amended proposed rules will prevent the possibility of abuses such as those alleged in the congressional hearings. The voluntary nature of procedures established by contract markets is a central part of this protection. A contract of adhesion, or an uninformed waiver of rights, is not a voluntary agreement, as customers may not be fully cognizant of the effects of an agreement to arbitrate until the claim or grievance arises. The amended proposed rule, therefore, provides that the parties' agreement to submit the claim or grievance to the procedure must have been made after the claim or grievance arose.[6]

Proposed Rule 180.3 was amended again on June 25, 1976.[7] In the notice that accompanied the amended proposed rule, the Commission stated:

> In this connection, futures commission merchants testified before the Commission in its oral hearing on March 5, 1976, that those firms would refuse to deal with persons who declined to sign binding arbitration agreements contained in customer agreement forms. This precludes a "voluntary" act by customers, since they would be effectively frozen out of the market unless they signed mandatory pre-dispute arbitration agreements.[8]

On September 24, 1976, the Commission adopted Rule 180.3 to become effective on November 29, 1976.[9] It prohibited the arbitration of disputes pursuant to a pre-dispute arbitration agreement that did not comply with the provisions of § 180.3(b) which, among other things, prohibited such agreements as a condition of doing business, prohibited the waiver of repara-

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6. 40 Fed. Reg. 54430, 54432-33 (1975), Com. Fut. L. Rptr. (CCH) ¶ 20,111, pp. 20798, 20805.

7. 41 Fed. Reg. 27526 (1976), Com. Fut. L. Rptr. (CCH) ¶ 20,177.

8. 41 Fed. Reg. 27526 (1976), Com. Fut. L. Rptr. (CCH) ¶ 20,177.

9. 41 Fed. Reg. 42942 (1976), Com. Fut. L. Rptr. (CCH) ¶ 20,216.

tions proceedings under Section 14 of the CFTC Act, and required the use of specified cautionary language. Pre-dispute arbitration clauses, such as the one signed by the Tamaris in this case, were in effect void. In its notice of the rule, the Commission stated as follows:

> Furthermore, in direct contrast to such commentators, the Commission believes that a court would not uphold currently extant pre-dispute arbitration agreements (if all the issues were before the court), notwithstanding the policy in favor of arbitration enunciated in the Federal Arbitration Act and the lack of an express statutory provision in the Act comparable to the Securities Act of 1933, the basis upon which *Wilko* v. *Swan*, 346 U. S. 427 (1953), was decided. This belief is based upon the following: (1) Since pre-dispute arbitration agreements are used by the entire industry, such agreements would effectively preclude a customer from seeking reparations as provided in section 14 of the Act; would negate the meaning of "voluntary" in section 5a(11) of the Act and would deprive commodity customers of private rights of action in courts of law under the Act, thus depriving customers of the remedial effects of the 1974 amendments to the Act; (2) Since the Commission has been advised that futures commission merchants will not deal with customers who do not sign pre-dispute agreements, there exists a pattern of systematic refusals to deal except in circumstances which eliminate certain basic rights of customers; and (3) Certain commodity customers who are unsophisticated are compelled to sign such agreements under conditions which suggest a lack of informed consent and the imposition of a contract of adhesion on them to their detriment.[10] [Footnotes omitted.]

Subsequently, the United States Courts of Appeals for the Second and Sixth Circuits have held that Section 180.3 also bars use of a pre-dispute arbitration agreement to compel arbitration of disputes arising prior to the effective date of the

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10. 41 Fed. Reg. 42942, 42944-45; Com. Fut. L. Rptr. (CCH) ¶ 20,216, pp. 21,163, 21,168.

regulation. *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, ... F. 2d ..... (1980), Fed. Sec. L. Rep. (CCH) ¶ 97,390 (6th Cir. No. 77-1300, May 12, 1980). *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F. 2d 1174 (2d Cir. 1977).

The premise for Regulation 180.3 and the decisions in *Curran* and *Ames* is that there is an inherent preference by commodities brokers and commission houses for requiring their customers to arbitrate disputes.[11] The pervasive inclination for compelling arbitration of customer disputes by the futures industry, of which the members of the CBOT Arbitration Committee were a part, would seem to compel the conclusion, based upon *Commonwealth Coatings,* that evident partiality existed in their judgment of whether the arbitration agreement was valid and voluntary. The arbitrators, who were brokers, officers of brokerage companies, and partners in trading companies, had a community of interest with Bache with respect to the validity of pre-dispute arbitration clauses. The effect of that interest is to deny customers access to the courts to resolve disputes.

The court below did not decide the specific question of whether an appearance of bias existed, based upon the findings of the CFTC, in the arbitrators' determination of the petitioners' voluntary or coerced presence in arbitration.[12] Instead, the court

11. This preference is also apparent from the adverse comment that Regulation 180.3 generated from industry sources when it and its earlier versions were published by the CFTC for comment. 40 Fed. Reg. 54430, 54432-34 (1975); 41 Fed. Reg. 27526 (1976); 41 Fed. Reg. 42942 (1976).

12. The Court below did state: "[t]here is no inherent bias or appearance of bias in the arbitration panel simply because its members were drawn from persons in the commodities business." Appendix A, p. 10. That general statement does not address the context of petitioners' argument. The Tamaris' position was based upon the findings of the CFTC relative to the industry's efforts to compel

(Footnote continued on next page.)

found without an evidentiary hearing in the District Court, (1) that petitioners waived their right to object (in Lebanon in January, 1974, before the Commodity Futures Trading Commission Act was passed), by designating the CBOT in response to Bache's demand notice; (2) that the record of the arbitration does not demonstrate actual bias; and (3) that the arbitrators could reasonably have determined that the Tamaris voluntarily agreed to arbitrate. None of those considerations are pertinent to an analysis of evident partiality as that doctrine was enunciated by this Court in *Commonwealth Coatings.* None of those considerations refutes the existence of evident partiality and none of them recognizes that justice must also have the appearance of justice.

Although the majority in *Tamari II* ruled that that issue could only be addressed in an action under Section 10 of the Arbitration Act,[13] Judge Sweigert, in dissent, recognized the existence of evident partiality. He stated:

(Footnote continued from preceding page.)
arbitration of disputes with customers. It should be noted, however, that CFTC Rule 180.2(a), 17 C. F. R. § 180.2(a), requires that a majority of the panel members not be associated with the exchange conducting the arbitration if a party so elects.

13. Tamari v. Bache & Co. (Lebanon) S. A. L., 565 F. 2d 1194 (7th Cir. 1977), Appendix G, pp. 13, 14. In avoiding the analysis required by *Commonwealth Coatings,* the court below stated that *Tamari II* had implicitly decided that there was no bias or appearance of bias in the arbitration panel. Petitioners submit that statement is in error. The *Tamari II* court specifically held that questions of voluntariness and bias could only be raised in a proceeding under Section 10 of the Arbitration Act and not in a proceeding under the Declaratory Judgment Act, 28 U. S. C. § 2201. Appendix G, pp. 13, 14. The premise for the conclusion of the court below, that *Tamari II* must have decided the evident partiality question, otherwise, it would require a futile arbitration process, is unfounded. The arbitration award had been entered six months before *Tamari II* was decided. The *Tamari II* court was aware that the instant action under Section 10 of the Arbitration Act had been filed. Appendix G, p. 2, n. 1.

> Given the congressional mandate to protect the individual commodities investor, the courts should not permit the dismissal of complaints alleging fraud by a commodities broker on the basis of an adhesion contract drafted by that broker. *We can be confident that, if the commodities brokers as a class can compel the arbitration of antifraud claims rather than litigating them in court, they will do so.* The arbitrators before whom the complaints would be filed would also be insiders in the commodities industry, and would tend to be more tolerant of questionable practices by brokers than would a judge who is an outsider to the field. But the individual investor is entitled to have his claim decided by an outsider. It contravenes the spirit of the Act and undermines its remedial purposes to remand the investor who contends a broker has committed fraud to a committee composed of other brokers on the basis of an arbitration clause in an adhesion contract. [Emphasis added.]

Tamari v. *Bache & Co. (Lebanon) S. A. L.*, 565 F. 2d at 1205-06; Appendix G, p. 20.

II.

THE JUDGMENT BELOW, THAT A DISTRICT COURT MAY DISMISS A COMPLAINT PURSUANT TO RULE 12(b)(6), FED. R. CIV. P., FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, ON THE BASIS OF EVIDENTIARY FINDINGS AND CONCLUSIONS OF FACT CONTRARY TO THE WELL-PLEADED ALLEGATIONS OF A COMPLAINT, DEPRIVES PETITIONERS OF THEIR STATUTORY AND DUE PROCESS RIGHTS AND SO FAR DEPARTS FROM ACCEPTED COURT PROCEDURES AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

In holding that the Tamaris had failed to state a claim upon which relief could be granted, with regard to the alleged Klopfenstein-Fivian relationship, the Court of Appeals relied on the assertions in the arbitration record made by Mr. Fivian that he never spoke with Mr. Klopfenstein in the employment nego-

tiations. Appendix A, p. 3. In addition, the court below relied on a statement in the arbitration record made by Robert Vanasco, the CBOT counsel, that the arbitration committee "assured itself that no prejudice would occur," as proof that the Tamaris had received a "full and impartial hearing on their claim." Appendix A, pp. 4-5. Finally, the court concluded—with respect to the Tamaris' allegation that during the arbitration Bache hired the Secretary of the CBOT, the administrative official responsible for arbitration proceedings—that since it found no evidence of bias in the record of the arbitration, no evidence casting doubt upon the fairness of the proceeding exists or could be offered. Those three factual conclusions and findings should not have been made to support dismissal of a complaint for failure to state a claim.[14]

The Court of Appeals held that the transcripts of the arbitration, which were made a part of the complaint, controlled the allegations of the complaint. But, in relying on assertions by Mr. Fivian and Mr. Vanasco as conclusive facts, the court reversed the rule that "the allegations of the complaint must be construed favorably to the pleader," *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974), and, instead, construed the counter-allegations of other persons most strongly against the Tamaris. In effect, the court interpreted informal denials of the Tamaris' allegations as conclusive adjudications against them, foreclosing

14. As noted above, the standard established in Commonwealth Coatings, for determining evident partiality under 9 U. S. C. § 10(b) is not the existence of actual bias, but rather "the appearance of bias." 393 U. S. at 150. Compare Commonwealth Coatings with Richmond Newspapers, Inc., et al. v. Virginia, ... U. S. ....., ... S. Ct. ....., 48 U. S. L. W. 5008 (July 2, 1980), wherein this Court stated (quoting from Levine v. United States, 362 U. S. 611 (1960)): "Justice must satisfy the appearance of justice." 48 U. S. L. W. at 5013. In Richmond Newspapers, this Court held that open criminal trials educate the public and help to ensure that "the means used to achieve justice . . . have the support derived from public acceptance of both the process and its results." Id. at 5012.

the possibility that evidence supporting the petitioners could be obtained by discovery and presented at a hearing.

To justify concluding that the assertions of Mr. Fivian were facts instead of mere assertions of fact, the court below relied on its own assertion that the Tamaris had a full opportunity at the April 7, 1976 hearing to discover the truth surrounding the Klopfenstein-Fivian relationship and its effects on the arbitration. That incorrectly assumes that Mr. Fivian and Mr. Klopfenstein were the only ones with knowledge of the facts. Moreover, the Tamaris were taken by surprise at the April 7, 1976 disclosure of the previously confidential relationship. They could not have been expected to uncover all the pertinent facts surrounding the relationship in just one day. Finally, the Tamaris did not have access to the sanctions and protections of judicially-supervised discovery practice to enable them to compel disclosure of the necessary facts. At no time did the Tamaris have access to facts concerning Bache's hiring of the CBOT secretary, since that did not become known until after the award.

The reliance by the court below on factual conclusions, contrary to the Tamaris' well-pleaded allegations, deprived the Tamaris of due process rights to a hearing on the allegation of evident partiality. The test set forth by this Court in *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), for determining the sufficiency of complaints dismissed under Rule 12(b)(6), Fed. R. Civ. P. is as follows:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admission, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Id. at 236. This Court then went on to quote from *Conley* v. *Gibson,* 355 U. S. 41, 45-46 (1953):

> In appraising the efficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

The court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION.

Petitioners have an arbitration award entered against them because the safeguards to which they are entitled under the United States Arbitration Act and the decisions of this Court have been abandoned. For these reasons, petitioners pray that this Honorable Court grant their petition for a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-1937

ABDALLAH W. TAMARI, LUDWIG W. TAMARI and FARAH W. TAMARI, co-partners doing business as WAHBE TAMARI & SONS CO.,

Plaintiff-Appellants,

v.

BACHE HALSEY STUART INC. (formerly Bache & Co. Incorporated), a Delaware corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-301—**John F. Grady**, *Judge.*

ARGUED FEBRUARY 19, 1980—DECIDED APRIL 25, 1980

Before FAIRCHILD, *Chief Judge*, PELL and TONE, *Circuit Judges.*

TONE, *Circuit Judge.* This is the fourth in a series of cases arising out of a dispute over two commodity accounts plaintiff Tamaris formerly maintained with defendant Bache Halsey Stuart's branch office in Beirut, Lebanon.[1] The dispute was submitted to arbitration

[1] The first three actions are as follows: *Tamari v. Bache & Co.*, No. 75 C 4189 (N.D. Ill., May 19, 1976), *appeal dismissed*, No. 76-1729 (7th Cir., Sept. 23, 1976) (*Tamari I*); *Tamari v. Bache & Co.*, No. 76 C 21 (N.D. Ill., May 1976), *aff'd*, 565 F.2d

(Footnote continued on following page)

before the Arbitration Committee of the Chicago Board of Trade (CBOT). The committee entered an award in favor of Bache for a balance due and against the Tamaris on their counterclaim for damages resulting from Bache's alleged mishandling of the accounts. In this action the Tamaris seek to set aside the award on various grounds. On the basis of the complaint, to which the Tamaris attached the entire record of the arbitration hearings, the district court granted Bache's motion for dismissal, ruling that the Tamaris had failed to state a claim. We affirm.

I.

The Tamaris first contend that the award should be set aside because, during the course of the arbitration hearings, the employer of arbitrator Ralph Klopfenstein hired Robert Fivian, a Bache vice president who testified in several of the arbitration hearings. The Tamaris argue that these circumstances demonstrate "evident partiality or corruption in the arbitrators" within the meaning of § 10(b) of the Federal Arbitration Act, 9 U.S.C. § 10(b) (1976),[2] or that they

[1] *continued*
1194 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978) (*Tamari II*); *Tamari v. Conrad*, No. 76 C 2071 (N.D. Ill., Nov. 15, 1976), *aff'd*, 552 F.2d 778 (7th Cir. 1977) (*Tamari III*).

Tamari I was a preliminary order that was not reviewed by this court and that has no relevance to the case at bar. The action is apparently still pending as against Bache's subsidiary in Lebanon. *Tamari II* held that the CBOT had authority to arbitrate the dispute under the agreements of the parties and that the issue of whether the Tamaris had voluntarily submitted their claim to arbitration was for decision by the arbitrators. *Tamari III* involved nearly the same subject matter as *Tamari II* and was dismissed. In addition to these cases, the Tamaris have filed complaints with the CBOT Business Conduct Committee and the Commodities Futures Trading Commission; they obtained no relief on either complaint.

[2] Our power to set aside an arbitration award is limited to the grounds set forth in 9 U.S.C. § 10. *National R.R. Passenger Corp. v. Chesapeake & O. Ry.*, 551 F.2d 136, 141-42

(Footnote continued on following page)

present at least the appearance of partiality and therefore void the award under the principles laid down in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968).[3]

The pertinent facts are as follows: The arbitration committee began hearings on December 11, 1975, and continued them at irregular intervals until May 17, 1976. During this time one of the arbitrators, Klopfenstein, was employed as an administrative vice president for Heinold Commodities, Inc. Near the beginning of 1976, a management executive search company, acting on behalf of Heinold, began employment negotiations with Fivian. Fivian learned at the end of January 1976 that it was Heinold that was seeking to hire him. Subsequent to this discovery, Fivian testified before the arbitration committee on three occasions concerning Bache's internal operating procedures and the identification of documents. He had no involvement in or connection with the dealings between the Tamaris and Bache and appeared to testify only because he had been designated by Bache to respond on its behalf to a subpoena to produce documents.

On March 17, Fivian agreed to become an administrative vice president at Heinold. Although this position was similar to Klopfenstein's, the latter did not engage in the employment negotiations between Heinold and Fivian.[4] Fivian informed Bache of his new employment

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[2] *continued*
(7th Cir. 1977) (quoting *Office of Supply, Republic of Korea v. New York Navigation Co.*, 469 F.2d 377, 379 (2d Cir. 1972)). The Tamaris apparently rely only on § 10(b) in making their first argument.

[3] *Commonwealth Coatings* held that § 10(b) implicitly allowed the setting aside of arbitration awards where one or more arbitrators "might reasonably be thought biased against one litigant and favorable to another." 393 U.S. at 150. Thus, even if actual bias or corruption is not found, the appearance of bias will void the award.

[4] Plaintiffs alleged otherwise in their complaint, but the hearing transcript appended to the complaint contains Fivian's testimony that at no time did he talk to Klopfenstein

(Footnote continued on following page)

on March 29, and he informed the arbitration committee on April 7, the first scheduled hearing after the notice to Bache. During the April 7 hearing, the committee informed the Tamaris of the situation, and Klopfenstein offered to withdraw if either party so requested. After being given a full opportunity to question Fivian and Klopfenstein, the Tamaris asked that Klopfenstein withdraw. Klopfenstein did so and, as a consequence, did not participate in the award. The Tamaris also requested, however, that the entire committee recuse themselves because of taint flowing from Klopfenstein's presence on the panel during Heinold's negotiations with Fivian. This the committee declined to do.

In explaining their decision to proceed, the committee emphasized that neither Fivian's change of employment nor Klopfenstein's presence on the panel had affected the course of the proceedings. Committee Chairman Newman stated,

> Mr. Fivian's testimony has never been really deliberated with this committee to any great extent.

He further said,

> At no time did any other member of this committee know of these negotiations nor were we swayed in any way by Mr. Klopfenstein's opinion or anything that was discussed.

CBOT counsel Robert Vanasco, who attended the committee meetings, said,

> Mr. Fivian's testimony has never been discussed by the committee and to that extent, Mr. Klopfenstein

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[4] *continued*
in connection with the employment negotiations and no contrary evidence. The transcript controls the allegations in the complaint under these circumstances, as the Tamaris recognize. [Pl. Br. 35.] *Cf. In re Woodmar Realty Co.*, 294 F.2d 784, 788 (7th Cir. 1961). Moreover, the Tamaris had a full opportunity to question Klopfenstein about this matter at the April 7 arbitration hearing. They evidently failed to do so, and we do not think justice requires that they be given a second chance when what evidence there is of record indicates that their allegation is unfounded.

> has had no influence on the committee with regard to that testimony, and the committee has, in its deliberations before, assured itself that no prejudice would occur and is ready to go forward with the case.

Chairman Newman added,

> [T]he discussions, decisions rather, that have been rendered during Mr. Klopfenstein's participation have all been procedural and in no case did Mr. Klopfenstein cast a deciding vote. No decisions were made on the merits of the case.

On the basis of the transcript of the arbitration hearings, the district court concluded that the Tamaris had received a full and impartial hearing on their claim. We see no reason to disagree with that assessment. The circumstances of which the Tamaris complain plainly do not demonstrate "evident partiality or corruption" on the part of either Klopfenstein or the other committee members.[5]

We also conclude that, even viewing the complaint in the light most favorable to the Tamaris, no claim has been stated that would warrant relief due to an appear-

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[5] Plaintiffs argue that they have been injured by procedural rulings made during Klopfenstein's tenure on the committee. We find no evidence of procedural bias, and neither did the district court. Plaintiffs also argue that Bache's counsel's argument to the committee urging them not to recuse themselves and force the parties to begin again an arbitration process that had already consumed in the neighborhood of two years was so inflammatory and prejudicial that the award must be vacated. Plaintiffs argue that arbitrators, like jurors in a criminal case, must be protected from the prejudicial argument of counsel. Initially, it does not appear that this issue was raised in the district court. Even if it was, we think plaintiffs overestimate the power of opposing counsel's rhetoric. We also reject the offered analogy to criminal trials. We doubt that a mere declamation concerning a posited duty to stand up to unfounded allegations of taint greatly swayed the minds of arbitrators chosen for their business knowledge and experience. Even assuming it did, the Tamaris had the chance to respond in a similar vein if they chose. We can find no prejudice to the Tamaris here.

ance of bias. Fivian's negotiations with Heinold were of necessity confidential until an agreement had been reached. When the decision was made, Fivian promptly disclosed it, and the Tamaris were promptly informed by the committee of what had occurred. Klopfenstein offered to withdraw and did withdraw in response to the Tamaris' request. Therefore, even assuming that Klopfenstein might reasonably appear to have had some non-trivial interest in the proceedings because his employer had hired the employee of a party, any appearance of bias was dispelled by the forthright manner in which the situation was handled once it became known. The record of the arbitration hearings, which controls insofar as it is in conflict with plaintiffs' complaint,[6] is similarly devoid of any manifestation of partiality.

It is relevant to the appearance of bias issue as well as the actual bias issue that Fivian was not an occurrence witness but rather Bache's delegate to produce documents and answer questions about the firm's operating procedures. His testimony did not relate to disputed issues of material fact, and the Tamaris have shown no prejudice to them even on the assumption that the arbitrators believed everything Fivian said in his testimony. Moreover, Fivian was negotiating to leave Bache and did so during the period in question. The possibility that Bache might have benefited from any indirect affinity that might have developed between Fivian and Klopfenstein because of the new employment relationship is so remote that we think no reasonable person would find an appearance of bias in Bache's favor on this account.

Nothing in *Commonwealth Coatings* or in the other cases relied on by the Tamaris would support a contrary result. These cases involve the failure to disclose relationships that might reasonably give rise to an appearance of partiality; in each of them an arbitrator with a significant connection to a party participated in

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[6] *See* note 4 *supra*.

an award.[7] In the case at bar, the relationship was never significant, and the arbitrator disclosed it at the first opportunity and withdrew.

In setting aside an award for bias, the "guiding principle" is,

> The interest or bias of an arbitrator must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative.

United States Wrestling Federation v. Wrestling Division of the AAU, Inc., 605 F.2d 313, 318 (7th Cir. 1979) (quoting *Lucke v. Spiegel*, 314 Ill. App. 2d 532, 536, 266 N.E.2d 504, 508 (1970). We think this principle applies whether actual bias or merely an appearance of bias is charged. As Justice White said in concurrence in *Commonwealth Coatings*,

> [A]rbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.

393 U.S. at 150. Here the possibility of bias was highly speculative, the facts were disclosed before decisions were made on the merits, and the arbitrator disqualified himself before substantive decisions were made. The Tamaris have failed to state a claim of either bias or the appearance of bias in the Fivian-Klopfenstein relationship, and the district court correctly so found.

II.

The Tamaris also argue that bias can be found in the fact that Bache hired Thomas Triggs, the Secretary of

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[7] *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 146 (1968); *Sanko S.S. Co. v. Cook Indus., Inc.*, 495 F.2d 1260, 1262 (2d Cir. 1973); *Rogers v. Shering Corp.*, 165 F.Supp. 295, 297 (D.N.J. 1958); *Johnston v. Security Ins. Co.*, 6 Cal. App. 3d 839, 842, 86 Cal. Rptr. 133, 135 (1970); *In re Merrolla*, 231 N.Y.S.2d 760, 761 (Sup. Ct., Special Term, Kings Cty. 1962).

the CBOT "while the arbitration was in progress." The Tamaris allege that the Secretary appointed the arbitration panel and that the Secretary was represented at all hearings by Vanasco, staff counsel to the CBOT. The Secretary might, therefore, have influenced the proceedings, it is argued.

In the first place, when the panel was selected Triggs had not been hired by Bache. In addition, CBOT rules do not give the Secretary the authority to select the arbitration panel; rather, they make plain that the Secretary's task with respect to arbitration is purely ministerial.[8] The full committee on arbitration is composed of ten members. Of these ten, eight apparently were assigned to hear the Tamaris' case, but for some reason only seven participated in the hearings, and the number was reduced to six by Klopfenstein's withdrawal. The record does not demonstrate the method by which fewer than all the members of the full committee were chosen to sit on the case, but even if we were to assume the Secretary was somehow responsible, that fact would not enable the Tamaris to state a claim. The award is vulnerable for bias only if the Tamaris can demonstrate "evident partiality or corruption in the arbitrators," 9 U.S.C. § 10(b), or the reasonable appearance of such partiality, *Commonwealth Coatings Corp. v. Continental Casualty Co.*, *supra*, 393 U.S. at 150. The Tamaris' argument turns on the tenuous speculation that a biased Secretary could have selected arbitrators who favored Bache. As we have already noted, the arbitration hearing transcripts do not show bias on the

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[8] CBOT rule 77, on which the Tamaris rely, provides, in pertinent part,

> The Secretary shall . . .
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> . . .
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> . . . attend, in person or by representative all meetings of the Committees on Arbitration and Appeals, and . . . keep an official record of the proceedings thereof. He shall also give notice to such Committees when their services are required, issue the necessary notices and papers to parties, and deliver to the interested parties copies of all awards or findings . . . .

part of the arbitrators. Moreover, the decision of the arbitration panel was unanimous. Simple mathematics indicates that the particular composition of the panel should not have mattered under these circumstances.[9] Given all this, we do not think that the speculation that the Secretary might have been biased, that the Secretary might have picked the panel, that the panel might therefore have been biased, and that the result might thus have been infected by prejudice or tainted by an appearance of bias is in any sense sufficient to make out a claim. *United States Wrestling Federation v. Wrestling Division of the AAU, Inc., supra*, 605 F.2d at 318.

The Tamaris did not raise in the district court the issue of bias resulting from Vanasco's alleged representation of the Secretary at the hearings, so it is too late to do so here. We have examined, however, the portions of the hearing transcript relating to the instances of participation by Vanasco that the Tamaris allege give rise to an appearance of bias. We find no evidence of partiality in them. The Tamaris argue, in substance, that the Secretary was biased or appeared to be biased because at some point he went to work for Bache, that Vanasco was biased or appeared to be biased because he may have been the representative of the Secretary, and, finally, that the arbitrators were biased or appeared to be biased because they were exposed to the views of Vanasco. The argument is both untimely made and frivolous.

III.

The Tamaris next argue that the arbitrators were biased in their determination that the Tamaris' presence before the committee was voluntary. This is the case, they contend, because the arbitrators were all drawn from the CBOT arbitration committee and therefore had

[9] It seems to us highly unlikely that the only two members of the full committee that were not designated to sit could have altered the outcome of the proceeding had they, and not two others, been designated. *Cf. United States Wrestling Fed'n v. Wrestling Div. of the AAU, Inc.*, 605 F.2d 313, 317 (7th Cir. 1979).

a vested interest in finding that arbitration clauses in commodity customer agreements are not contracts of adhesion.

This court held in *Tamari II*, 565 F.2d 1194, 1201-02 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978), that the question of whether the Tamaris had voluntarily submitted the dispute to arbitration was to be decided by the arbitrators. The CBOT arbitration panel determined that it had jurisdiction to hear the dispute because the Tamaris had voluntarily submitted it to them. That decision is subject to review here only under the provisions of 9 U.S.C. § 10. *National Railroad Passenger Corp. v. Chesapeake & Ohio Railway*, 551 F.2d 136, 141-42 (7th Cir. 1977). The Tamaris contend that the jurisdictional decision is tainted by "evident partiality or corruption in the arbitrators" within the meaning of § 10(b).[10]

There is no inherent bias or appearance of bias in the arbitration panel simply because its members were drawn from persons in the commodities business.[11] This is implicit in this court's decision in *Tamari II*; any other view would mean that *Tamari II* required a futile arbitration process before a panel that would in the end merely be found incompetent to hear the case due to bias or the appearance of bias. It is also to be noted that under the agreement to arbitrate the Tamaris had the choice of submitting to arbitration before either the CBOT or the American Arbitration Association. In addition, correspondence of record indicates that Bache offered the Tamaris a third option, submitting to

[10] We do not understand the Tamaris to argue that the award is invalid because the arbitrators "exceeded their powers" within the meaning of 9 U.S.C. § 10(d) when they determined that the agreement to arbitration was voluntary. In any event, this contention would be barred by this court's decision in *Tamari II*, 565 F.2d at 1201-02.

[11] To conclude otherwise would deal a serious blow to arbitration as a method of dispute settlement. Often one of the major benefits of arbitration is the expertise of arbitrators who are familiar with the subject in question. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, *supra*, 393 U.S. at 150 (White, J., concurring).

arbitration before the Board of Governors of the New York Stock Exchange. The Tamaris' election to proceed before the CBOT gives a hollow ring to their argument of inherent bias or the appearance thereof in CBOT arbitrators.[12]

Finally, if it were necessary to go further, we would find no indication in the record of the arbitration proceeding of actual bias on the part of the arbitrators; their decision that the Tamaris voluntarily agreed to arbitrate is reasonable in view of the record. Even if it were assumed that the Tamaris signed the original agreement to arbitrate under duress, because they could not otherwise obtain a commodity customer account with Bache, they did not make a timely assertion of agreement under duress when a dispute over the contract arose. Instead, they again agreed to arbitration by selecting the CBOT forum, by executing a submission to arbitration with Bache, and by actually proceeding to litigate the case before the arbitration committee. The committee could reasonably have determined that four agreements to arbitrate were sufficient to demonstrate voluntariness on the part of the Tamaris.

IV.

The Tamaris next argue that the arbitration panel was not properly constituted under CBOT rules and the terms of the submission agreement. They argue first that the submission agreement required that the dispute be submitted to "present" members of the arbitration committee, and that most of the members who heard the dispute were not members of the committee when the Tamaris and Bache executed the submission agreement. The agreement also provided, however, for submission of

[12] The Tamaris also argue that all arbitrators who could have heard their dispute with Bache would have been biased because they all would have had ties to the commodities business. They thus conclude that their choice of forum was of no consequence. This argument is frivolous; it is also precluded by this court's decision in *Tamari II*, 565 F.2d at 1201-02.

the dispute to "substitutes" for the "present" members. We find no merit in this argument.

The Tamaris argue, second, that the agreement provided for submission to a "quorum" of the committee, that CBOT rules define a "quorum" as five members, and that the fact that seven members heard the case renders the award invalid. A "quorum" is "[s]uch a number of the officers or members of any body as is, when duly assembled, legally competent to transact business." *Webster's New International Dictionary* 2046 (2d ed. 1937). Plainly, the agreement meant only that the dispute must be resolved by at least the minimum number necessary to make up a quorum, not that a number in excess of the minimum was unacceptable.

Third, the Tamaris argue that because CBOT rules require an arbitrator to continue to hear a case if his term on the arbitration committee expires during the pendency of an arbitration and his presence on the panel is necessary to preserve a quorum, the failure of panel members whose terms expired during the pendency of the instant arbitration to step down when their presence was not necessary to preserve a quorum voids the award. The rule does not speak to the situation in which presence is not necessary to preserve a quorum. The holdover panel members were not, therefore, in violation of CBOT rules, and the award is unaffected.

V.

The Tamaris next argue that the award must be set aside because the appeals procedure provided by the CBOT was meaningless. They base the argument on the fact that the appeals committee did not accept written briefs or oral argument in considering the appeal. The Tamaris had the opportunity to communicate with the appeals committee and present any argument they wished by letter. They chose not to do so. We know of no right to a non-judicial review of an arbitration award other than as provided by the terms of the parties' agreement. The appeal that was here accorded was in compliance with the parties' agreement and the CBOT

rules and was not unfair to the Tamaris. Their contention is therefore without merit.

VI.

Finally, the Tamaris argue that the district court erred in failing to accord them discovery with respect to the Klopfenstein-Fivian episode and the hiring of the CBOT Secretary by Bache. We have held that the district court acted correctly in dismissing the Tamaris' complaint as to these matters, and it follows from that ruling that no facts that the Tamaris could discover would render their claim sufficient. Moreover, with respect to the Klopfenstein-Fivian matter, the Tamaris had a full opportunity to explore the circumstances in the arbitration hearings.

The judgment of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4512—Midwest Law Printing Co., Inc., Chicago—4-25-80—350

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
for the Northern District of Illinois
Eastern Division

Abdallah W. Tamari, et al.,
Plaintiffs,
vs.
Bache Halsey Stuart, Inc.,
Defendant.
No. 77 C 301

JUDGMENT ORDER.

This cause came on to be heard on the motion of the defendant to dismiss the complaint against it, and the court having granted said motion, it is hereby

Ordered, Adjudged and Decreed that judgment be entered herein in the defendant's favor dismissing the action.

Dated: February 26, 1979

Enter: /s/ John F. Grady
United States District Judge

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
for the Northern District of Illinois
Eastern Division

Abdallah W. Tamari, et al.,
Plaintiffs,
vs.
Bache Halsey Stuart, Inc.,
Defendant.
No. 77 C 301

MEMORANDUM OPINION.

This action is the latest in a series of lawsuits and administrative proceedings arising out of a dispute between the parties concerning two commodity accounts maintained by the Tamaris with Bache's branch office in Beirut, Lebanon.[1] Pursuant to the contract between the parties, the suit was submitted to an arbitration panel which entered an award in favor of Bache in the amount of $451,640.16, the debit balance remaining in the Tamaris' accounts with Bache plus interest. The arbitrators dismissed the counterclaim of the Tamaris, which sought damages in excess of two million dollars for Bache's alleged misrepresentations, excessive trading, and "churning" of accounts.

The Tamaris' complaint seeks to vacate the award of the arbitration panel. They allege that the panel was not legally selected; that its actions were arbitrary, biased and unfair; that it had no jurisdiction to entertain the matter; that the panel and the Appeals Committee which affirmed the award failed to give adequate reasons for their decisions; and that the Appeals Committee failed to permit a hearing or the filing of issues. Defend-

ants move to dismiss on the grounds, among others, that plaintiff's complaint is barred by res judicata, and that the complaint fails to state a claim upon which relief may be granted. For the reasons set out below, the motion to dismiss is granted.

At the outset we note that every presumption is in favor of the arbitration award's validity, and the party challenging an award has the burden of showing its impropriety. *See Shahmoon Industries, Inc.* v. *United Steelworkers of America* 263 F. Supp. 10 (D. N. J. 1966). We may set aside an award only if we determine that one of the grounds specified by 9 U. S. C. Section 10 exists. *Nat'l R. R. Passenger Corp.* v. *Chesapeake & Ohio Ry.*, 551 F. 2d 136 (7th Cir. 1977). The statute provides, in pertinent part:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> * * * * *
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Evident Partiality

The thrust of plaintiffs' claim of partiality stems from the fact that a witness and vice-president for Bache, Mr. Fivian, accepted employment with Heinhold Commodities, Inc., with whom one of the arbitrators, Mr. Klopfenstein, was employed as vice-president. The negotiations leading up to Fivian's employment were contemporaneous with the arbitration proceedings.

Mr. Klopfenstein, however, took no part in the employment discussions, and had no conversations with Mr. Fivian on this matter. Bache was first notified of Mr. Fivian's new employment on March 29, 1976, and the members of the arbitration panel first became aware of it on April 7, 1976. At the arbitration hearings on April 7, 1976, the parties were informed of these facts and, at the Tamaris' request, Mr. Klopfenstein withdrew as a member of the panel that same day. The panel did not enter its award in this matter until June 21, 1976.

An arbitration award should be set aside where the panel might reasonably be thought biased. *See Overseas Private Investment Corp.* v. *Anaconda Co.*, 418 F. Supp. 107 (D. D. C. 1976). But the burden of proving bias rests heavily upon the party asserting it. *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F. 2d 1268 (2d Cir. 1971); *see generally, Overseas Private Investment Corp.* v. *Anaconda Co.*, 418 F. Supp. at 110. We do not believe that plaintiff has met this burden.

We recognize that in order to avoid even the appearance of bias, arbitrators must disclose any nontrivial dealings with one party which are not known to the other party. *Garfield & Co.* v. *Wiest*, 432 F. 2d 849 (2d Cir. 1970). The relationship between Mr. Klopfenstein and Bache, however, can hardly be considered to be "more than trivial." *See Commonwealth Coatings*, 393 U. S. at 152 (White, J., concurring). Mr. Fivian was not a party to the arbitration proceedings and would not appear to have any personal stake in the outcome of the arbitration. The only connection between Mr. Klopfenstein and Bache is that Mr. Klopfenstein's employer hired Bache's employee. We think that under these circumstances, nothing more was required than that the relationship between Mr. Klopfenstein and Bache be promptly disclosed to plaintiff. This was done. The arbitrator then withdrew from the panel and did not participate in making the award.

Moreover, although Mr. Klopfenstein did sit on the panel for a number of hearings which were contemporaneous with Mr.

Fivian's negotiations with Heinhold Commodities, Inc., a situation Klopfenstein perhaps could have avoided, we do not believe that plaintiff suffered any prejudice as a result. The transcripts of the arbitration proceedings of April 8, 1976, show that the decisions rendered during Klopfenstein's participation were all procedural, and "in no case did (he) cast a deciding vote." Transcript at 52. We must determine the sufficiency of plaintiff's complaint in the light of the record before us. *In Re Woodmar Realty Co.*, 294 F. 2d 785 (7th Cir. 1961).[2] Since the record convinces us that the decision of the Arbitration Committee was not biased, we may not vacate the award under 9 U. S. C. Section 10(b).

Misconduct With Respect to Scheduling of Hearings and Evidentiary Rulings.

Plaintiffs contend that they were prejudiced by the arbitration panel's refusal to postpone hearings despite the inaccessability to them of various relevant documents. Again we find that the transcripts of the arbitration hearings belie plaintiffs' allegations. The record is replete with instances where the panel excused the Tamaris from presenting evidence and documents called for by the panel. Even if the panel did not postpone the proceedings every time plaintiffs would have liked them to, this alone does not constitute a violation of 9 U. S. C. Section 10(c). *See Local Union No. 251* v. *Narragansett Improvement Co.*, 503 F. 2d 309 (1st Cir. 1974). The basic purpose of arbitration is to dispose of disputes without excessive delay and expense, and we see no abuse of discretion in the arbitrators' actions here. *Id.*

The same must be said with respect to the panel's refusal to issue certain subpoenas to Bache. The record clearly indicates that Bache was required to produce numerous documents, and that further subpoenas would have been issued had the Committee become convinced of the relevance of the documents

and testimony. Transcript April 8, 1976, p. 67. The Tamaris never demonstrated such relevance. Furthermore, "the statute cannot be read . . . to intend that every failure to receive relevant evidence constitutes misconduct which will require the vacation of an arbitrator's award." *Newark Stereotypers' Union* v. *Newark Morning Ledger Co.*, 397 F. 2d 594, 599 (3d Cir. 1968), *cert. denied*, 393 U. S. 954.

Illegal Constitution of the Arbitration Committee.

Plaintiffs allege that the arbitration panel which rendered the award in this case was not properly constituted. They rely on the following provision of the arbitration submission agreement:

> [the parties] do hereby mutually agree to submit the said differences and controversies for decision, in accordance with the rules of the Board of Trade of the City of Chicago to a quorum of the *present* "Committee of Arbitration" elected by said Board of Trade, *or to substitutes for members of said Committee*, as the case may be. (emphasis added)

Only three of the eight arbitrators who attended the arbitration hearings were members of the "present" Committee of Arbitration; that is, the Committee as constituted on the date the submission agreement was signed. The other five arbitrators were members of the Committee of Arbitration at the time the arbitration hearings between the parties began. We believe they were authorized to take part in the hearings as "substitutes for members" of said Committee.

The Tamaris further argue that the arbitration panel was illegal because several of the arbitrators whose terms expired during the course of the hearings did not withdraw from the panel. The Tamaris rely on Rule 198 of the Chicago Board of Trade[3] which provides in pertinent part:

> Whenever a panel of the Committee of Arbitration . . . has begun to hear or review evidence and argument in any

> arbitration proceedings, and the term of a committee member on that panel expires, such member shall continue in office until the arbitration proceeding before his Committee has ended if his absence would defeat a quorum of such Committee in the proceeding.

During the course of the arbitration proceedings, three of the arbitrators' terms expired but they continued to participate on the panel, despite the fact that the presence of all three was not necessary to constitute a quorum (five members) of the panel. Thus, plaintiffs contend that the panel was not authorized to make an award.

We agree with defendant that the purpose of Rule 198 is to prohibit a panel member from withdrawing upon expiration of his term if his absence would destroy a quorum. The rule does not specifically require a panel member to withdraw. Additionally, the fact that there were holdover members of the panel was brought to the attention of the parties as early as February 11, 1976, yet the Tamaris continued to participate in the hearings and did not raise an objection on this ground until April 8, 1976. The Tamaris impliedly waived any objection to holdover arbitrators.

Furthermore, we believe Chicago Board of Trade Rule 195 precludes the plaintiffs' challenge on this point. That rule provides:

> Jurisdiction of Committees Not Open to Question. Any person who submits a controversy to either of such Committees, or who appears and prosecutes or defends a case before either of such Committees, or who takes any steps therein, shall be conclusively presumed to have voluntarily recognized the jurisdiction of such Committee to hear *and determine such controversy,* and shall not thereafter allege the contrary.

We read Rule 195 as barring the Tamaris' challenge of the authority of the arbitration panel to render an award in the present case. Having prosecuted and defended claims before the

panel, the Tamaris may not now challenge the panel's authority to "determine such controversy." Rule 195 precludes all of plaintiff's challenges to the jurisdiction of the arbitration panel.[4]

Absence of Some Arbitrators.

Plaintiffs next contend that there were numerous meetings of the arbitration panel at which all members of the panel were not present. We believe that this objection was waived by the conduct of plaintiffs' attorneys throughout the proceedings. On numerous occasions, the plaintiffs were informed of the absence of certain panel members and expressly waived any objection on this ground. *See* Transcripts of Arbitration Hearings, January 26, 1977, p. 45; January 14, 1976, p. 2; February 12, 1976, p. 2. "It is . . . well settled that defects in proceedings . . . during arbitration may be waived by a party's acquiescence in the arbitration with knowledge of the defect." *Order of Railway Conductors* v. *Clenchfield R. R. Co.,* 407 F. 2d 985 (6th Cir. 1969).

Failure to Give Adequate Reasons.

Plaintiffs base their complaint, in part, on the failure of the Arbitration Committee and the Appeal Committee to support their decisions with statements of reasons, which, according to plaintiffs, prevent this court from conducting a meaningful review of these decisions. We find no merit in this position. Because of the limited role of the courts in reviewing arbitration awards, and the basic policy of employing arbitration to dispose of disputes without excessive delay, arbitrators are not required to give reasons for their decisions. *See Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198, 203 (1956). As the Court of Appeals for the Second Circuit stated in *Sobel* v. *Hertz, Warner & Co.,* 469 F. 2d 1211, 1214 (2d Cir. 1972):

> Obviously, a requirement that arbitrators explain their reasoning in every case would help to uncover egregious failures to apply the law to an arbitrated dispute. But such a rule would undermine the very purpose of arbitration,

> which is to provide a relatively quick, efficient and informal means of private dispute settlement.
>
> * * * * *
>
> . . . the Supreme Court has made it clear that there is no general requirement that arbitrators explain the reasons for their award.

Failure to Permit a Hearing on Appeal.

Finally, plaintiffs contend that the failure of the Appeals Committee to grant a hearing rendered the appeal process meaningless. Rule 190 of the Chicago Board of Trade, however, which was applicable to the proceedings here in question, provides:

> The [Appeals] Committee, after taking oath, shall review the case upon the record of the testimony and evidence given before the Committee of Arbitration. No additional testimony or evidence shall be given before the Committee of Appeals. . . .

Clearly, the Appeals Committee was under no obligation to hear additional testimony, and the plaintiffs will not be permitted to object to a procedure which they previously agreed to.

In dismissing plaintiffs' complaint, we would point out that a reading of the transcripts of the arbitration proceeding convinces us that both parties were accorded a fair, impartial and non-arbitrary forum in which to settle their dispute. Giving plaintiffs the benefit of all reasonable inferences, we do not believe their claim can stand in light of the record before us. For all of the foregoing reasons, defendant's motion to dismiss is granted.

Dated: February 26, 1979.

Enter: /s/ John F. Grady
United States District Judge

1. *See* Tamari v. Bache & Co., No. 75 C 4189 (N. D. Ill. May 19, 1976, *appeal dismissed,* No. 76-1729 (7th Cir. Sept. 23, 1976); Tamari v. Bache & Co., No. 76 C 21 (N. D. Ill. May 19, 1976), *aff'd,* 565 F. 2d 1194 (7th Cir. 1977), *cert. denied,* 435 U. S. 905 (1978); Tamari v. Conrad, No. 76 C 2071 (N. D. Ill. Nov. 15, 1976), *aff'd,* 552 F. 2d 778 (7th Cir. 1977).

2. We treat this as a motion to dismiss rather than a motion for summary judgment, despite the fact that reference is made throughout to the transcripts of the arbitration proceedings. Plaintiffs, in their complaint, have incorporated by reference these transcripts, and under Federal Rule of Civil Procedure 10(c), they are considered a part of the pleadings.

3. The parties agreed, in the arbitration submission agreement, to be governed by the rules of the Chicago Board of Trade.

4. Any claims by plaintiff to the effect that 7 U. S. C. Section 7a(11) as amended prohibited the Chicago Board of Trade from conducting the arbitration in this case are barred, under the doctrine of res judicata, by the decision in Tamari v. Bache & Co., 565 F. 2d 1194 (7th Cir. 1977).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, co-partners doing business as Wahbe Tamari & Sons, Co.,
Plaintiffs,
vs.

Bache Halsey Stuart Inc. (formerly Bache & Co. Incorporated), a Delaware corporation,
Defendant,
and

Bache Halsey Stuart Shields, Inc. (formerly Bache & Co. Incorporated), a Delaware corporation,
Counterplaintiff,
vs.

Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, individually and as co-partners doing business as Wahbe Tamari & Sons and Wahbe Tamari & Sons Company,
Counterdefendants.

No. 77 C 301

ORDER CONFIRMING ARBITRATION AWARD AND ENTRY OF JUDGMENT THEREON

This Cause coming on to be heard on motion of defendant-counterplaintiff, Bache Halsey Stuart Shields Incorporated (for-

merly known as Bache & Company), for an order confirming in its entirety and entering judgment upon the arbitration award entered June 21, 1976, by the Arbitration Committee of the Board of Trade of the City of Chicago, (i) granting an award to defendant-counterplaintiff, Bache Halsey Stuart Shields Incorporated, in the amount of $451,640.16, plus $25.00 in costs, against plaintiffs-counterdefendants, Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, individually and as co-partners doing business as Wahbe Tamari & Sons and Wahbe Tamari & Sons Company, and (ii) dismissing the counterclaim filed in said arbitration proceedings by said plaintiffs-counterdefendants; and the Court having considered its Judgment Order entered February 26, 1979, dismissing the complaint herein filed by plaintiffs-counterdefendants and the Court having also considered the counterclaim of defendant-counterplaintiff, and the answer thereto, as well as the affidavit of Frank W. Giordano in support of defendant-counterplaintiff's motion; and it appearing to the satisfaction of the Court that said arbitration award was properly made as set forth in the Memorandum Opinion of this Court entered February 26, 1979; and the Court being fully informed in the premises;

It Is Ordered, Adjudged and Decreed:

1. That said motion to confirm said arbitration award and to enter judgment thereon be and the same is hereby granted.

2. That said arbitration award be confirmed in its entirety as to the sum of $451,665.16, together with statutory interest thereon from June 21, 1976, and as to the dismissal of the counterclaim therein.

3. That judgment be and it is hereby entered in favor of defendant-counterplaintiff, Bache Halsey Stuart Shields Incorporated, and against plaintiffs-counterdefendants, Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, individually and as co-partners doing business as Wahbe Tamari & Sons and Wahbe Tamari & Sons Company, in the sum of $451,665.16,

plus $91,337.00 interest from June 21, 1976, plus the costs of this action.

4. That judgment be and it is hereby entered in favor of defendant-counterplaintiff, Bache Halsey Stuart Shields Incorporated, and against plaintiffs-counterdefendants, Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, individually and as co-partners doing business as Wahbe Tamari & Sons and Wahbe Tamari & Sons Company, upon their counterclaim in said arbitration.

Enter:

/s/ John F. Grady
United States District Judge

Dated: April 10, 1979.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Abdallah W. Tamari, et al.,
Plaintiffs,
vs.
Bache Halsey Stuart, Inc.,
Defendant.

No. 77 C 301

MEMORANDUM OPINION

Plaintiffs filed this action asking that we vacate an arbitration award. Defendant moved to dismiss and filed a counterclaim for enforcement of the award. We entered an order dismissing the complaint on February 26, 1979. On April 10, 1979, we entered judgment in favor of defendant on its counterclaim. Plaintiffs move to reconsider. We will deny the motion for the following reasons.

Plaintiffs' principal argument in support of the motion to reconsider is addressed to the question of the possible prejudice of one of the arbitrators, Mr. Klopfenstein. Klopfenstein was vice-president of Heinhold Commodities, Inc. During the course of the arbitration proceedings, Heinhold hired Mr. Fivian, an employee of Bache who had testified before the arbitration panel. In our Memorandum Opinion of February 26, 1979, we characterized the relationship between Mr. Klopfenstein and Bache as trivial. (Page 3). We noted that Klopfenstein had no conversations with Fivian and withdrew from the panel before it addressed any substantive issues. Under such circumstances,

we concluded that plaintiffs could not have been prejudiced by Klopfenstein's participation in the proceedings.

Plaintiffs now contend that we erred in dismissing the complaint, and that they should be allowed to proceed with discovery to determine exactly what Klopfenstein knew with regard to the hiring of Fivian at the time Klopfenstein was sitting on the abitration panel. We believe that whatever the extent of Klopfenstein's knowledge concerning the ongoing employment discussions, his relationship with a party to the arbitration proceedings, Bache, was never more than trivial. Plaintiffs have still failed to explain how they possibly could have been prejudiced by Heinhold's hiring of a Bache employee. In the absence of such an explanation, we will not open discovery and permit this action to proceed.

Plaintiffs also point out that in our Memorandum Opinion we did not discuss Paragraph 32(bb) of the Complaint, in which plaintiffs allege that the Secretary of the CBOT, who by rule is required to attend arbitration meetings, became employed by Bache Delaware during the course of the proceedings. We did not discuss this allegation because we do not believe it presents any claim which would justify overturning the arbitrator's award. The *Commonwealth Coatings* case, cited by plaintiffs, is totally inapposite since the Secretary of the CBOT was not a member of the arbitration panel.

The motion to reconsider is denied.

Dated: August 3, 1979

Enter: /s/ Illegible
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, co-partners doing business as Wahbe Tamari & Sons, Co.,
Plaintiffs,
vs.
Bache Halsey Stuart Inc. (formerly Bache & Co. Incorporated), a Delaware corporation,
Defendant.

Jan. 27, 1977
Received
H. Stuart Cunningham
Clerk United States District Court
Judge Grady
77 C 301

COMPLAINT

Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, doing business as Wahbe Tamari & Sons Co., plaintiffs, by their attorneys, filed this action against defendant Bache Halsey Stuart Inc. (formerly Bache & Co. Incorporated) a Delaware corporation, and allege as follows:

1. This is an action to vacate, set aside, and hold null and void an award of the Arbitration Committee, as affirmed by the Appeals Committee, of the Board of Trade of the City of Chicago, pursuant to the provision of 9 U. S. C. § 10.

2. The matter in controversy exceeds the amount of $10,000.00 exclusive of interest and costs. Jurisdiction is conferred on this Court by 28 U. S. C. § 1331(a), 28 U. S. C. §1332, 28 U. S. C. § 1337 and 28 U. S.C. § 1350.

3. Plaintiffs Abdallah W. Tamari, Ludwi W. Tamari and Farah W. Tamari ("Tamaris") are citizens and legal residents

of Lebanon, where, among other things, they do business under the style of Wahbe Tamari & Sons Co.

4. Defendant Bache Halsey Stuart Inc. (formerly Bache & Co. Incorporated) ("Bache Delaware") is a corporation organized under the laws of Delaware, and it does, and has a place of business in Chicago, Illinois.

5. Arbitration proceedings between Tamaris and Bache Delaware before the Arbitration Committee and the Appeals Committee of the Board of Trade of the City of Chicago ("CBOT") were concluded by decision of the Appeals Committee on January 25, 1977.

6. The circumstances under which the arbitration proceeding between Tamaris and Bache Delaware came before the CBOT and the Arbitration and Appeals Committees are described hereinafter.

7. On or about May 20, 1972 and September 22, 1972 Tamaris executed customer agreements with respect to two separate commodity futures trading accounts on Bache Delaware forms which incorporated a pre-dispute arbitration clause which provided as follows:

> "14. This contract shall be governed by the laws of the State of New York, and shall inure to the benefit of your successors and assigns, and shall be binding on the undersigned, his heirs, executors, administrators and assigns. Any controversy arising out of or relating to my account, to transactions with or for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then obtaining of either the American Arbitration Association or the Board of Governors of the New York Stock Exchange as I may elect, except that any controversy arising out of or relating to transactions in commodities or contracts relating thereto, whether executed or to be executed within or outside of the United States shall be settled by arbitration in accordance with the rules then obtaining of the Exchange (if any) where the transaction took place, if within the

United States, and provided such Exchange has arbitration facilities or under the rules of the American Arbitration Association as I may elect. If I do not make such election by registered mail addressed to you at your main office within five days after demand by you that I make such election then you may make such election. Notice preliminary to, in conjunction with, or incident to such arbitration proceeding, may be sent to me by mail and personal service is hereby waived. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof, without notice to me."

(A copy of this customer agreement is attached hereto as Exhibit A.)

8. The execution of the forms referred to in paragraph 7, above, by Tamaris resulted from solicitations of Bache & Co. (Lebanon) S. A. L. ("Bache Lebanon") to have open commodity futures accounts. The circumstances of such solicitations, the opening of the commodity futures accounts, the transactions in commodity futures contracts in such accounts and the dispute that subsequently occurred between Tamaris and Bache Delaware are described in Tamaris' Answer and Counterclaim filed with the CBOT (a copy of which is attached hereto as Exhibit B) and in the complaint filed in this Court captioned *Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, co-partners doing business as Wahbe Tamari & Sons Co., Plaintiffs* v. *Bache & Co. (Lebanon) S. A. L., a Lebanese corporation and Bache & Co. Incorporated, a Delaware corporation, Defendants,* Case No. 75 C 4189 (a copy of which is on file in this Court and attached hereto as Exhibit C.)

9. On or about January 9, 1974, Bache Delaware, claiming that Tamaris owed it the sum of $376,366.96 for debit balances in Tamaris two commodity accounts, notified the Tamaris, in writing that it was invoking the pre-dispute arbitration clause contained in its customer agreements with the Tamaris and demanded that they elect as the arbitration forum, either the Board of Governors of the New York Stock Exchange or the American

Arbitration Association within five days from the date of demand and further notified them that, if they did not, Bache Delaware would select the arbitration forum. (A copy of such notification is attached hereto as Exhibit D.)

10. On or about January 12, 1974, Tamaris notified Bache Delaware according to the pre-dispute arbitration clause that the arbitration forum should be the exchange where the commodity transactions took place, i.e., the CBOT. Tamaris further requested that the arbitration include their claim against Bache Delaware for recovery in the amount of $2,115,000. (A copy of such notification is attached hereto as Exhibit E.)

11. On or about February 1, 1974, Bache Delaware filed its claim, labeled a "Complaint", against Tamaris with the CBOT. (A copy of this "Complaint" is attached hereto as Exhibit F.) Such "Complaint" was filed prior to the time any arbitration submission agreement had been executed by the parties.

12. On or about April 27, 1974, Tamaris executed a submission agreement furnished to them by the CBOT for the arbitration of the dispute between Tamaris and Bache Delaware. (Exhibit G attached hereto.)

13. On or about September 17, 1974, Tamaris filed their "Answer and Counterclaim" to the "Complaint" of Bache Delaware, in which the Tamaris counterclaimed to recover the sum of $2,150,000 which they had previously paid to Bache Delaware for losses suffered in their accounts and also requested that it be adjudicated that the Tamaris did not owe the amount of $376,366.96 claimed by Bache Delaware.

14. Tamaris' counterclaim filed with the CBOT, alleged, among other things, the following violations of law and exchange rules by Bache Delaware:

a) The churning of Petitioners' accounts in violation of Section 4b of the Commodity Exchange Act, Rule 146 of the CBOT and similar rules of other exchanges;

b) Violations of Sections 1.33, 1.33a(a)(2), 1.33a(b), of the Regulations promulgated under the Commodity Exchange Act;

c) Violations of Regulation 1990 of the CBOT, Rules 145 and 146 of the CBOT and similar rules and regulations of other exchanges;

d) Violations of Rule 210 of the CBOT, paragraphs 8, 12, 14 and 15 of Regulation 1822 of the CBOT and similar rules and regulations of other exchanges relating to margin requirements; and

e) Other violations of Section 4b of the Commodity Exchange Act and also breaches of fiduciary duty.

15. In the spring of 1975, subsequent to the filing of Tamaris' Answer and Counterclaim with the CBOT, the CBOT questioned, because of the amendments to the Commodity Exchange Act, which became effective on April 21, 1975, whether or not the Arbitration Committee of the CBOT had jurisdiction to entertain arbitration of the dispute between Bache Delaware and Tamaris and then continued the matter generally. As of that time the Arbitration Committee had not met with respect to the dispute between Tamaris and Bache Delaware; nothing was pending before the Committee concerning such matter; and the CBOT had not yet determined whether or not it would hear the matter.

During the summer and early fall of 1975, Tamaris, through their attorney, communicated with attorneys for the CBOT as to the status of the matter. The response was that the CBOT, through its attorneys, was to seek a ruling from the Commodity Futures Trading Commission ("CFTC") as to whether or not the CBOT could exercise jurisdiction over the matter.

17. In July of 1975, the staff of the CFTC issued an interpretive opinion to the effect that the arbitration proceedings brought by customers pending before the effective date (April 21, 1975) of the amendments to the Commodity Exchange Act,

were not abated by said Act. (The opinion is attached hereto as Exhibit H.)

18. It was not until on or about October 16, 1975, that the first meeting was held by the Arbitration Committee of the CBOT respecting the dispute between Tamaris and Bache Delaware. At that meeting, among other things, the question was raised by counsel for Bache Delaware as to whether or not the Arbitration Committee had authority to proceed with the arbitration in view of the interpretive opinion of the staff of the CFTC. At that time, the applicability of such opinion was rejected by the Arbitration Committee, stating that it would proceed only if the parties would execute waivers waiving any objections to the Committee's jurisdiction to proceed in the matter. The Committee, through its counsel, further stated that it would draft a form of waiver to be executed by the parties. The Committee at that meeting, also rejected the applicability of such interpretive opinion to another arbitration matter which had come before the Committee. The Committee, however, did tentatively set the date of December 11, 1975, to proceed with the arbitration between the Petitioners and Bache Delaware, provided that the parties executed the waivers waiving any objections to the Committee's jurisdiction.

19. On or about October 29, 1975, the attorney for the Tamaris received a letter dated October 27, 1975, from house counsel for the CBOT. (A copy of that letter is attached hereto as Exhibit 1.) The letter, in pertinent part, provides as follows:

> "Enclosed is a form which the Arbitration Committee *requires* your client to sign before it will begin hearings on this matter. If the notarization is taken anywhere other than the State of Illinois, the Committee will require a certification of notarial acknowledgement indicating the authority of the notary to so notarize the document." (Emphasis supplied.)

20. On or about October 30, 1975, the Arbitration Committee of the CBOT again met. Among other things, the question

was raised by the attorney for Bache Delaware as to whether or not the Arbitration Committee could proceed with the arbitration between Tamaris and Bache Delaware in light of the interpretive opinion of the CFTC. Again, the applicability of such opinion was rejected by the Arbitration Committee as to both the arbitration matter between Tamaris and Bache Delaware and the other arbitration matter referred to above. Again, it was stated that the aforesaid form of waiver was required to be executed by the parties before the Arbitration Committee would proceed in the arbitration but that, if such waivers were executed, hearings would begin on December 11, 1975.

21. In a letter dated and hand-carried to the CBOT on or about December 9, 1975, the Arbitration Committee was advised of Tamaris' refusal to execute the waiver required by the CBOT and of Tamaris' intention to seek relief in a court proceeding. (A copy of that letter is attached hereto as Exhibit J.)

22. On or about December 10, 1975, Tamaris filed a complaint against Bache Delaware and Bache Lebanon in this Court. The complaint, seeking recovery of $2,115,000 under the Commodity Exchange Act, 7 U. S. C. § 1 *et seq.*, is identified in paragraph 8, *supra*.

23. On or about December 11, 1975, Tamaris filed a complaint with the Business Conduct Committee of the CBOT against Bache Delaware. (A copy of that complaint is attached hereto as Exhibit K.)

24. On or about December 10, 1975, Tamaris filed a complaint with the CFTC against Bache Delaware. (A copy of that complaint is attached hereto as Exhibit L.)

25. At or about 1:00 P.M. on December 11, 1975, Tamaris' counsel received a letter by messenger from the house counsel for the CBOT which stated, among other things, that the Arbitration Committee would convene that day at 3:00 P.M. with respect to the matter involving Tamaris and Bache Delaware. House counsel also served in an advisory capacity to the

Arbitration Committee. (A copy of such letter is attached hereto as Exhibit M.)

26. On December 11, 1975, at approximately 3:00 P.M., which followed the filing of Tamaris' complaint in this Court on December 10, 1975, the Arbitration Committee met and at that meeting advised Tamaris' counsel for the first time that the execution of the required waiver, referred to in paragraph 18, 19 and 20 above, was no longer required, and, further, that the Committee had decided to proceed immediately with the hearing of the arbitration matter.

27. The Arbitration Committee had never met or heard any evidence concerning the arbitration matter prior to December 11, 1975. By proceeding with the matter, the Arbitration Committee without notice contradicted and contravened its earlier ruling not to proceed with the matter unless and until it received the required waivers. Notwithstanding its earlier insistence upon executed waivers, and Tamaris' reliance thereon, the Arbitration Committee proceeded over Tamaris' objection to receive evidence even though the Tamaris had elected to refuse to sign the required waivers and proceed in this Court for relief under the Commodity Exchange Act, and had so informed the Arbitration Committee prior to their December 11, 1975.

28. The letter of December 11, 1975 to Tamaris' counsel from the house counsel of the CBOT (a copy of which is attached hereto as Exhibit M) refers to a letter of house counsel dated December 5, 1975 concerning another arbitration matter in which Tamaris' counsel was counsel for one of the parties. Referring to the earlier letter dated December 5, 1975, house counsel stated as follows in his letter of December 11, 1975:

> "In that letter I enclosed a copy of CFTC interpretive letter # 75-1 which indicates that matters submitted to arbitration prior to April 21, 1975 may be heard without regard to the Section 5a(11) restrictions of the Act. Therefore, as you well know, since the jurisdictional issues in the that case are identical to the jurisdictional issues in the

Bache-Tamari case, the reasons for your clients to execute the waiver has been obviated."

29. Contrary to house counsel's urging, the jurisdictional issues in the other case are not identical to the jurisdictional issues in the instant case. Secondly, the CFTC interpretive letter (#75-1) had been issued and was known prior to the October meeting's Arbitration Committee, and the Committee had still insisted on executed waiver to jurisdiction. Thirdly, the letter while dated December 5, 1975, was postmarked Monday, December 8, 1975 and was not received by the office of Tamaris' counsel until Wednesday, December 10, 1975.

30. At no time prior to December 10, 1975, had Tamaris' counsel been apprised by anyone associated with the CBOT or with the Arbitration Committee, or by anyone, that the CBOT or the Arbitration Committee had decided to proceed with the other arbitration matter, nor prior to December 11, 1975, had Tamaris' counsel been apprised that the CBOT or the Arbitration Committee had decided to proceed with the arbitration between Tamaris and Bache Delaware, unless Tamaris executed the required waivers.

31. On December 11, 1975 and thereafter, at the direction of the assigned panel of the Arbitration Committee, and over the continuing objections of Tamaris, oral hearings were also held respecting the matter. The additional hearing dates were January 7, 1976, January 14, 1976, January 26, 1976, February 11, 1976, February 12, 1976, March 2, 1976, March 9, 1976, April 7, 1976, April 8, 1976 and May 17, 1976. Hearings were also scheduled for May 18, 1976, May 19, 1976, May 20, 1976, May 26, 1976 and May 27, 1976.

32. The conduct of the CBOT and the assigned panel members of the Arbitration Committee during the hearings listed in paragraph 31 hereof was arbitrary, prejudicial, biased, unfair and oppressive with respect to the rights of Tamaris, in the following respects, among others:

a) On or about December 11, 1975, being informed and well knowing that Tamaris had refused to sign the required waiver, waiving objection to their jurisdiction and being informed and well knowing that it was the Tamaris' intention to seek relief against Bache Delaware in a court proceeding (Exhibit J), the Committee panel reversed itself on the matter of requiring the waiver, ignored or disregarded the existence of the intervening federal court case identified in paragraph 8 and ordered that the evidentiary proceedings commence immediately, all to the detriment of Tamaris;

b) The two-hour notice that the Committee panel gave to Tamaris that it would proceed with the matter on December 11, 1975, was both unreasonable and also unfair to Tamaris in light of the circumstances and representations of the Committee panel that it would not proceed with the arbitration matter unless Tamaris executed the waiver required by the Committee;

c) The Committee panel misled and deceived the Tamaris in that it had represented to Tamaris that it would not proceed on December 11, 1975 with the arbitration matter unless Tamaris executed a waiver waiving any and all objections to the jurisdiction of the CBOT over the matter;

d) On or about February 20, 1976, Tamaris learned, for the first time, that it was Bache Delaware that had requested the ruling which had led to the interpretive opinion of the staff of the CFTC (Exhibit H hereof). This was pointed out to the Arbitration Committee at a hearing held on March 2, 1976. In a letter dated March 8, 1976 (a copy of which is attached hereto as Exhibit U), counsel questioned the propriety of such procedures pointing out that Tamaris had no opportunity to provide any imput with respect to the letter

of Bache Delaware which requested a ruling for the Commission. Since the Commission was asked to interpret Section 5a(11) of the Commodity Exchange Act, as amended, it was extremely important to know how the question to the Commission was framed. For example, was the Commission advised that the arbitration was one in which the initiating party was an exchange member and futures commission merchant, or that the arbitration arose out of an argument to arbitrate entered into prior to the time that the dispute arose, or that the arbitration was involuntary. The failure of the Committee panel to advise Tamaris that Bache Delaware had requested a ruling from the Commission's staff so as to afford Tamaris an opportunity to submit input on the question operated to the prejudice of Tamaris.

e) Despite the terms of the submission agreement, applicable rules and regulations of the CBOT and the law, the CBOT and the Arbitration Committee failed to provide Tamaris with a legally constituted panel of members of that Committee to hear the arbitration proceeding. Instead the selection of the Committee panel did not comply with the requirements of the submission agreement, applicable rules and regulations of the CBOT or law. In this connection, see the letter of Tamaris' counsel, dated May 7, 1976, the contentions of which were summarily dismissed by the Committee at a hearing held on May 17, 1976, without giving any grounds for such rejection. (A copy of the letter of May 7, 1976 is attached hereto as Exhibit N); (see also paragraph 35 through 59, below.)

f) During the course of the Arbitration proceedings there was a continuing and uniform failure on the part of the Committee to rule on motions and objections of

Tamaris and when rulings were made, a failure to state grounds for such rulings;

g) The Committee panel proceeded over Tamaris' objections to entertain the arbitration matter even though the matter presented numerous and complex issues of law and fact and was of a nature and scope which rendered it inappropriate for arbitration;

h) The Committee panel refused to postpone hearings despite its knowledge that certain material documents necessary to the defense of the Tamaris and the presentation of their claim were located in Lebanon and not accessible to them because of the civil war there;

i) The Committee panel issued a subpoena duces tecum directing Tamaris to produce certain documents which were located in Lebanon and not in their possession or control and despite the civil war in Lebanon, the Committee panel made unfair and unreasonable demands for their immediate production.

j) The Committee panel refused to issue subpoenas ordering Bache Delaware to produce documents determinative of the issue of whether or not Tamaris' commodity accounts were properly margined or under margined on the ground that Tamaris were not entitled to assert the claim that Bache Delaware violated CBOT rules and regulations relating to margin requirements;

k) The Committee panel refused to issue subpoenas requiring certain officers and employees of Bache Delaware to appear and testify on the ground that the Committee desired to hear the testimony of Tamaris as a condition precedent;

l) The Arbitration Committee refused to disqualify the panel hearing the matter despite the fact that its composition did not meet the requirements of the sub-

mission agreement, the rules of the CBOT, or law and thus was illegally constituted and without authority to make a valid award.

m) The Arbitration Committee refused to disqualify the panel hearing the matter despite the fact that from January, 1976 through April, 1976 one of the members of the panel had been secretly negotiating with the Bache Delaware representative, designated by Bache Delaware to appear on its behalf and to testify, for the purpose of employing him;

n) The rulings made by the Arbitration Committee from January through April, 1976 are tainted by the participation therein of the panel member who was contemporaneously engaged in mutually beneficial, undisclosed, repeated private discussions with the Bache Delaware representative at the arbitration proceedings;

o) The legal advisor to the Arbitration Committee, who was house counsel for the CBOT, participated in the making of rulings affecting the interests of the Tamaris in the arbitration proceeding at the same time that he was acting as an advocate for the CBOT, which was an adversary to the Tamaris in the case before this Court which concerned the same subject matter;

p) The Committee panel scheduled protracted evidentiary hearings (four consecutive days and thereafter to be followed by two consecutive days) and directed Tamaris, over their objections, to give testimony during such hearings despite the fact the Committee had refused to issue subpoenas duces tecum ordering Bache Delaware to produce certain documents which were material and necessary to the proper presentation of Tamaris' testimony and case;

q) The Committee panel directed the order of proof of Tamaris' case;

r) The Committee panel scheduled hearings and refused to postpone such hearings despite its knowledge that the scheduling of such hearings interfered with the preparation of Tamaris cases in this Court;

s) Throughout the proceedings the Committee panel, by its own conduct and rulings and by its deference to the wishes of counsel for Bache Delaware and tolerance of his intemperate conduct toward the Tamaris and their counsel, ceased functioning as fair and impartial arbitrators and became activists on behalf of Bache Delaware; (Transcripts of all proceedings are incorporated herein by reference and submitted to this Court under separate cover. Bache Delaware will not be served with copies since their counsel already has copies.)

t) The Committee panel refused to postpone an evidentiary hearing despite the illness of Tamaris' counsel;

u) The CBOT and the Arbitration Committee, by refusing, in the Spring of 1975, either to assert jurisdiction over the matter or determine whether or not it would hear the matter, placed Tamaris in a legal uncertainty as to the status of the matter vis-a-vis the CBOT and the Committee, all to the prejudice of Tamaris;

v) Notwithstanding the protracted delay caused by the refusal of the CBOT and the Arbitration Committee to assert jurisdiction over the matter, the Committee panel then ignored or summarily dismissed the fact that the civil war in Beirut, Lebanon severely crippled Tamaris' ability to proceed. Incredibly, the Committee repeatedly and arbitrarily accused Tamaris of delaying the proceedings;

w) Despite the fact that Tamaris' counterclaim, filed with the CBOT on September 17, 1974, alleged a number of violations of the Commodity Exchange Act and

CBOT rules and regulations, to Tamaris' knowledge the CBOT Business Conduct Committee never undertook any investigation of Bache Delaware;

x) On or about December 11, 1975, the Arbitration Committee was specifically advised that Tamaris had formally requested the Business Conduct Committee to conduct an investigation of the conduct of Bache Delaware vis-a-vis violations of CBOT Rules. However, the Arbitration Committee failed to acknowledge that the dual conflicting functions of the CBOT as forum and investigator placed it in a position of conflict of interest.

y) On or about January 7, 1976, the CBOT and the Committee panel were informed that the Tamaris had filed suit in this Court seeking among other things, to enjoin the CBOT and the Committee from conducting further hearings. Despite knowledge of the fact that the suit rendered the CBOT and the Committee adversaries of Tamaris, the Committee and its counsel disregarded the conflict of interests that existed and continued to schedule proceedings and entertain the arbitration matter. The suit is identified as *Abdallah Tamari, et al.* v. *Bache & Co. (Lebanon) S. A. L. et al.*, Number 76 C 21, and is on appeal.

z) The Arbitration Committee applied and relied upon a CFTC staff opinion, which purportedly directly applied to the subject arbitration matter, when in fact it did not because substantial aspects of the question had not been fairly and completely presented to the CFTC staff for consideration.

aa) Notwithstanding Rule 183 of the CBOT and Section 7 of the Legislative Act to Incorporate the Board of Trade, Chicago, and notwithstanding Tamaris continuing objections that their presence was involuntary the Committee persisted in conducting proceedings.

Moreover, the Committee proceeded when it was under no legal compulsion to do so and thereby granted Bache Delaware the relief Bache Delaware otherwise sought by its Motion To Compel Arbitration filed in the federal court in case number 75 C 4189, described in paragraph 22, above. This act of the Committee panel further manifested its bias and prejudice against Tamaris.

bb) The Secretary of the CBOT, who, under CBOT Rule 77(c), is responsible for the conduct of proceedings before the Arbitration and Appeals committees, became employed by Bache Delaware during the course of the proceedings.

33. In addition to the above recited instance of error and prejudice, the panel of arbitrators hearing this matter was illegally constituted and without jurisdiction or legal authority to render a valid award. The applicable facts and CBOT Rules follow.

34. On or about April 27, 1974, Tamaris in connection with the controversy involving them and Bache Delaware, executed an arbitration submission agreement furnished to them by the CBOT which provided in part, as follows:

> "[The parties] do hereby mutually agree to submit the said differences and controversies for decision, in accordance with the rules of the Board of Trade of the City of Chicago to a quorum of the present 'Committee of Arbitration' elected by said Board of Trade, or to substitutes for members of said Committee, as the case may be. . . ."

(A copy of the arbitration submission agreement is attached hereto as Exhibit O.)

35. Rule 182 of the CBOT, as applicable here, provides:

> "Five members of [the Committee of Arbitration] shall constitute a quorum"

(A copy of Chapter 6 of the Rules of the CBOT, insofar as they relate to arbitration (Rules 180-199), is attached hereto and incorporated herein as Exhibit P.)

36. On April 27, 1974, the date on which Tamaris executed the arbitration submission agreement, the Arbitration Committee was composed of the following ten persons:

William L. Allen
William J. Griffin, Jr.
Jordan A. Hollander
Neal E. Kottke
James F. Shea
William P. Conrad, Jr.
Martin J. Dempsey, Jr.
Stuart A. Newman
Edward B. Rhea, Jr.
Jerome M. Spielman

Of this number, only Messrs. Conrad, Newman and Rhea were appointed to the panel of arbitrators considering the arbitration matter involving Tamaris and Bache Delaware. No explanation or statement has ever been made or offered by the CBOT as to why none of the other members of the Arbitration Committee at the time of the execution of the arbitration submission agreement were appointed to complete the quorum of five panel members as required by the submission agreement.

37. Instead, William P. Conrad, Jr., Stuart A. Newman, Edward B. Rhea, Jr., Robert B. Armstrong, David Baby, Lawrence M. Corbin, Donn R. Farr and Ralph D. Klopfenstein were members of the Committee panel. The election of these CBOT members to the membership on the Arbitration Committee occurred as follows:

a) The two year terms of office of Messrs. Allen, Griffin, Hollander, Kottke and Shea on the Committee expired on or about January 14, 1975, and the terms of three of the panel members—Conrad, Newman and Rhea—

as well as those of Messrs. Dempsey and Spielman, expired on about January 20, 1976.

b) On or about January 20, 1975, the following five CBOT members were elected members of the Arbitration Committee as successors to Messrs. Allen, Griffin, Hollander, Kottke and Shea, whose terms of office had expired on or about January 14, 1975:

Robert B. Armstrong
David Baby
Lawrence M. Corbin
Donn R. Farr
Ralph D. Klopfenstein

These CBOT members were not members of the Arbitration Committee on April 27, 1974, the date on which the Tamaris executed the arbitration submission agreement.

38. Tamaris have no knowledge of who appointed Messrs. Conrad, Newman, Rhea, Armstrong, Baby, Corbin, Farr and Klopfenstein to this panel of arbitrators or why these particular persons were appointed to the panel or why other Committee members were not appointed. Tamaris did not participate in such appointment nor were they consulted. Rather, Tamaris relied upon the CBOT and the Arbitration Committee to follow the terms of the submission agreement and the rules of the CBOT in this regard.

39. It was not until subsequent to April 8, 1976, as a consequence of the events at the hearings on April 7 and 8, 1976, that Tamaris learned when the various panel members had been elected to the Arbitration Committee and that Messrs. Armstrong, Baby, Corbin, Farr and Klopfenstein were not members of the Arbitration Committee on April 27, 1974, the date on which Tamaris executed the arbitration submission agreement.

40. It was the duty of the Arbitration Committee and the panel members to determine that the panel was validly consti-

tuted in accordance with the term of the arbitration submission agreement, the rules of the CBOT and applicable law.

41. It was the duty of each member of the Arbitration Committee and panel members to determine whether or not he met the qualifications to serve on the panel as prescribed by the submission agreement and the rules of the CBOT.

42. Each panel member had read the submission agreement and, being a member of the CBOT and the Arbitration Committee, had knowledge of the CBOT rules relating to arbitration matters.

43. The Arbitration Committee members breached the duties alleged in paragraphs 42 and 43 hereof.

44. Rule 198 of the CBOT, in pertinent part, provides as follows:

> "Whenever a panel of the Committee of Arbitration . . . has begun to hear or review evidence and argument in any arbitration proceedings, and the term of a committee member on that panel expires, such member shall continue in office until the arbitration proceeding before his committee has ended if his absence would defeat a quorum of such committee in the proceeding."

45. As alleged in subparagraph 39(a) hereof, the terms of office of Messrs. Conrad, Newman and Rhea on the Arbitration Committee expired on or about January 20, 1976.

46. As alleged in paragraph 37 hereof, Rule 182 of the CBOT provides that five members of the Arbitration Committee shall constitute a quorum.

47. Messrs. Conrad, Newman and Rhea have all participated in meetings of the panel hearing the arbitration matter subsequent to January 20, 1976, the date on which their terms as members of the Arbitration Committee expired. As of and subsequent to January 20, 1976, the presence of all three was not necessary to constitute a quorum of either the panel or the Arbitration Committee. The continued participation of Messrs.

Conrad, Newman and Rhea at hearings after their terms had expired is not authorized under the rules of the CBOT, nor was the continued participation of all three authorized or sanctioned by Rule 198 since all were not required to maintain the quorum of five.

48. During the course of the proceedings, the chairman of the panel, Mr. Newman, stated and continued to state, until on or about April 8, 1976, that all members of the panel were required to be present and participate at each.

49. At a meeting of the panel held on December 11, 1975, during which testimony was taken, Mr. Corbin was not present nor has he attended or participated in any meeting of the panel relating to the arbitration matter subsequent to that date.

50. Tamaris have never waived the attendance of Mr. Corbin at any meeting of the panel relating to this arbitration.

51. Tamaris were never notified that Mr. Corbin had withdrawn from the panel or that he had refused to act on the panel or attend hearings.

52. On or about April 7, 1976, Mr. Klopfenstein was disqualified from the panel and thereafter did not attend any meetings of the panel or participate in any decisions concerning the arbitration matter.

53. There have been other meetings of the panel relating to the arbitration matter at which all members of the panel were not present and whose attendance was not waived by Tamaris.

54. On or about April 7, 1976, and again on or about April 8, 1976, at meetings of the panel, Tamaris notified and advised Messrs. Conrad, Newman, Rhea, Armstrong, Baby and Farr, the only panel members present at such meetings, that the panel was illegally constituted and demanded that the panel disqualify itself from proceeding further, but the panel members disagreed with and rejected the contentions of Tamaris and ordered that the arbitration proceed.

55. On or about May 7, 1976, Tamaris again notified and advised the Arbitration Committee by letter that the panel was not legally constituted and demanded that it disqualify itself. (A copy of the letter is attached hereto as Exhibit N).

56. At a meeting on May 17, 1976, the six panel members named in paragraph 56, above, again disagreed with and rejected the contentions of Tamaris that the panel was illegally constituted and ordered that the arbitration proceedings continue to be heard by the panel.

57. On May 17, 1976, Tamaris refused to proceed further before the panel on the grounds, among others, that the panel was not legally constituted, that the panel was without legal authority or jurisdiction to render a valid award and that any award rendered by it would be void.

58. By reason of the facts hereinabove alleged, the panel was illegally constituted, such panel was without legal authority and jurisdiction to render a valid award and any award made by the panel is void, for the following reasons:

a) That the controversy, as required by the terms of the arbitration submission agreement, was not submitted for decision to a panel consisting of "a quorum [five members] of the present 'Committee of Arbitration' " (i.e., five persons who were members of the Arbitration Committee on April 27, 1974, the date on which the Petitioners executed the arbitration submission agreement) but, instead, was submitted to a panel consisting of eight persons, only three of whom—Messrs. Conrad, Newman and Rhea—were members of the "present 'Committee of Arbitration' " (i.e., the Committee as constituted on April 27, 1974) and thus eligible to serve on the panel, and five of whom—Messrs. Armstrong, Baby, Corbin, Farr and Klopfenstein—were not members of the Arbitration Com-

mittee on April 27, 1974 and thus not eligible to serve on the panel; or

b) That on January 20, 1976, the terms of office of Messrs. Conrad, Newman and Rhea on the Arbitration Committee having expired and the presence of all of these three persons not being necessary to constitute a quorum of either the panel or the Arbitration Committee, by reason of Rule 198 of the CBOT all of the three persons were then no longer eligible to continue in office and serve on the panel; or alternatively;

c) That of the panel members—Messrs. Conrad, Newman, Rhea, Armstrong, Baby, Corbin, Farr and Klopfenstein—who composed the panel, as originally constituted, some were no longer members of the panel, some did not attend each meeting of the panel and some did not participate in all the decisions of the panel.

59. Following Tamaris' refusal to proceed on May 17, 1976, the Committee panel, on June 21, 1976, rendered their award in favor of Bache Delaware. The award ordered Tamaris to pay Bache Delaware the sum of $451,604.16 and costs, and dismissed Tamaris counterclaim against Bache Delaware. (The award is attached hereto as Exhibit Q.)

60. On June 28, 1976, Tamaris appealed the award to the Appeals Committee of the CBOT and as stated in paragraph 5 above the Appeals Committee affirmed the decision of the Arbitration Committee on January 25, 1977. (The decision of the Appeals Committee together with its transmittal letter are attached hereto as Exhibits R and S, respectively.)

61. The decision of the Appeals Committee was rendered without first permitting Tamaris an opportunity to present to the Appeals Committee the issues raised on appeal even though Tamaris requested such an opportunity. (See Exhibits T, U, V, W, X and Y attached hereto.)

62. The decision of the Appeals Committee was rendered without first affording Tamaris a hearing even though a hearing was requested by Tamaris. (See Exhibits T, U, V, W, X & Y).

63. The Appeals Committee was not, nor could it have been, adequately informed of Tamaris' issues on appeal.

64. The absence of issues on appeal rendered the appeal process meaningless and any purported "review" equally meaningless.

65. The refusal and failure to grant a hearing on appeal also rendered the appeal process meaningless and any purported "review" equally meaningless.

66. The failure of the Arbitration Committee to support its award with a statement of reasons, findings of fact and grounds precluded meaningful review by the Appeal Committee.

67. The failure of the Appeal Committee to support its decision with a statement of reasons, findings of fact and grounds operates to prevent this Court from conducting a meaningful review of the reasons, findings and grounds for the Appeals Committee's decision.

68. The failure of the Arbitration Committee to support its decision with a statement of reasons, findings of fact and grounds further operates to prevent a meaningful review of the award and decision.

WHEREFORE, the plaintiffs, Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, co-partners doing business as Wahbe Tamari and Sons, Co., pray:

(1) That this Court entertain this action;

(2) That this Court enter a judgment pursuant to Title 9, U. S. C. § 10, declaring that the Arbitration Committee and the Appeals Committee of the CBOT were not authorized to enter a valid award or decision against Tamaris for the following reasons: the Arbitration Committee panel was not legally selected as constituted; the conduct of the CBOT and the Arbi-

tration Committee during the hearings listed in paragraph 31 hereof was contrary to law, arbitrary, prejudicial, biased, unfair and oppressive with respect to the rights of the Tamaris; the Arbitration and Appeals Committees of the CBOT had no jurisdiction to entertain the matter; the award of the Arbitration Committee and the decision of the Appeals Committee each renders meaningful administrative and judicial review impossible; Tamaris were deprived of due process of law under the United States and Illinois constitutions by the refusal of the Appeals Committee to permit the filing of issues on appeal and by failing to provide a hearing in connection therewith;

(3) That the defendant be enjoined from proceeding in this cause, or having this cause adjudicated, in any other forum until such time as the judgment of this Court in this action shall have been entered; and

(4) That the plaintiffs have such other, further and different relief as this court may deem just and proper.

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Appendix G

In the United States Court of Appeals For the Seventh Circuit

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No. 76-1728

ABDALLAH W. TAMARI, LUDWIG W. TAMARI and FARAH W. TAMARI, Co-partners doing business as WAHBE TAMARI & SONS CO.,

Plaintiffs-Appellants,

v.

BACHE & CO. (LEBANON) S.A.L., a Lebanese corporation, BACHE & CO. INCORPORATED, a Delaware corporation, and the BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 21—**John F. Grady**, *District Judge.*

ARGUED FEBRUARY 25, 1977—DECIDED OCTOBER 19, 1977

Before SWYGERT and WOOD, *Circuit Judges*, and CHRISTENSEN, *Senior District Judge.**

WOOD, *Circuit Judge.* This is the second in a series of four cases growing out of the same transactions brought by plaintiffs, a Lebanese partnership and its partners

* The Honorable A. Sherman Christensen, Senior District Judge of the United States District Court for the District of Utah, is sitting by designation.

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(hereinafter "Tamari"), principally against Bache & Co., Incorporated, a Delaware corporation, now Bache Halsey Stuart, Inc. (hereinafter "Bache"), in an effort to obtain declaratory relief for alleged fraud in violation of the Commodity Exchange Act, 7 U.S.C. § 1, *et seq.*[1] Service was not secured upon Bache & Co. (Lebanon) S.A.L., a Lebanese corporation.

The present or second case is an appeal from the order of the district court entered on May 19, 1976, dismissing plaintiff's one count complaint on the ground that the complaint failed to state a claim upon which relief could be granted. The complaint seeking declaratory and injunctive relief under the Commodity Exchange Act, as amended, 7 U.S.C. § 1, *et seq.*, and 28 U.S.C. § 2201, prayed for the termination of the arbitration proceeding then in progress between Tamari and Bache being

[1] It may be helpful to identify the other cases. The first case was filed by Tamari on December 10, 1975, in the District Court for the Northern District of Illinois, seeking damages for fraud under the Commodity Exchange Act. The present or second suit in the same court followed on January 6, 1976, seeking to halt the arbitration proceedings. On May 19, 1976, the district court ruled in favor of defendants in both cases, holding that there was an enforceable agreement to arbitrate under the Federal Arbitration Act, 9 U.S.C. §§ 3-4, and that Tamari was to proceed to arbitrate accordingly. Appeals followed. This court on September 23, 1976, dismissed the appeal in the first case, without prejudice to any further appeal from an appealable order. *Tamari v. Bache & Co. (Lebanon) S.A.L.*, No. 76-1729 (7th Cir. Sept. 23, 1976). Prior to that decision, Tamari on June 6, 1976, filed its third action which was against the eight arbitrators named by the Chicago Board of Trade, who were then in the process of hearing the dispute between Tamari and Bache. Bache was permitted to intervene in that suit. The district court on November 15, 1976, dismissed that action, holding that Tamari had to proceed with the pending arbitration and exhaust all avenues of administration appeal before returning to the district court. This court affirmed. *Tamari v. Conrad*, No. 77-1003 (7th Cir., April 12, 1977). On January 27, 1977, at the conclusion of the arbitration the fourth suit was filed by Tamari against Bache, seeking to have the district court set aside the award of the panel of arbitrators adverse to Tamari, which was entered on June 21, 1976, and affirmed by the Appeals Committee of the CBOT on January 25, 1977. That case is still pending in the district court.

conducted by the Chicago Board of Trade (hereinafter CBOT). The complaint alleged in general the existence of a dispute between Tamari and Bache, Tamari's establishment of commodity futures trading accounts with Bache, trading in those accounts and monies paid and allegedly owing to Tamari as a result of the trading. The grounds alleged for the relief sought were summarized by Tamari as follows: Tamari's agreement to participate in arbitration was induced by fraud and coercion which rendered the arbitration agreement invalid; Section 5a(11) of the Commodity Exchange Act, 7 U.S.C. § 7a(11), which became effective on April 21, 1975, applied and operated to bar arbitration; and there were infirmities which arose out of the arbitration proceedings themselves. We do not, however, read Tamari's complaint as alleging that the "agreement" to arbitrate contained in the original total agreement was specifically induced by fraud and coercion as distinguished from the contract generally. What is alleged in addition to fraud relating to the total agreement generally is that the "submission" of the dispute to arbitration was caused by fraud; that Tamari did not "voluntarily submit" to the jurisdiction of the CBOT; and that "participation" in the arbitration was coerced. These conclusionary and general allegations read together appear to us to refer primarily to events occurring after the original agreements containing the arbitration clauses were entered into.

Preceding the district court's order of dismissal the court entered on April 21, 1976, what was captioned a "Preliminary Opinion." In that opinion the court concluded that Tamari and Bache had entered into a valid arbitration agreement covering the underlying dispute; that the Federal Arbitration Act applied and that under Sections 3 and 4 of that Act, 9 U.S.C. §§ 3-4,[2] the

[2] The Federal Arbitration Act provides in pertinent parts as follows:

> Sec. 3. Stay of proceedings where issue therein referable to arbitration.—If any suit or proceeding be brought in any of the courts of the United States upon any issue

(Footnote continued on following page)

case should be stayed as to Bache (Lebanon), dismissed as to Bache and CBOT, and Tamari ordered to arbitrate; that Section 5a(11) of the Commodity Ex-

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[2] *continued*

referable to arbitration under an agreement in writing for such arbitration, the court in which the suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Sec. 4. Failure to arbitrate under agreement—Petition to United States court having jurisdiction for order to compel arbitration—Notice and service thereof—Hearing and determination.—A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [Rules, part 1]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the

(Footnote continued on following page)

change Act, 7 U.S.C. § 7a(11), did not apply to the case, since the savings provision of that Act, 7 U.S.C. § 4a, note,[3] precluded its application; and that Tamari's other claims were premature and could only be raised after completion of arbitration pursuant to Section 10 of the

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[2] *continued*

return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure [Rules, part 1], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

[3] The Commodity Exchange Act as amended by the Commodity Futures Trading Commission Act of 1974, provides in pertinent parts:

7 U.S.C. § 7a(11)

Each contract market shall—

* * *

(11) Provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof; provided, that (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term 'customer' as used in this subsection shall not include a futures commission merchant or a floor broker. . . .

7 U.S.C. § 4a, note

Pending proceedings under existing law shall not be abated by reason of any provision of this Act but shall be disposed of pursuant to the applicable provisions of the Commodity Exchange Act, as amended, in effect prior to the effective date of this Act.

Federal Arbitration Act, 9 U.S.C. § 10.[4] That preliminary opinion was entered jointly in both the first case and in this case. Against that background the district court's subsequent *sua sponte* dismissal of the complaint in this case upon the ground that it failed to state a claim upon which relief could be granted must be interpreted. Plaintiff argues that the factual assumptions made by the court in the preliminary opinion, principally that there was a valid agreement to arbitrate, denote the dismissal a grant of summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Plaintiff's position is that certain material factual assumptions made by the court have no proper foundation in the record and are in dispute. Therefore, plaintiff argues the court's subsequent order was the improper entry of summary judgment. Were we to view the order as granting summary judgment we would agree with plaintiffs, but we perceive the order instead to be a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure which provides for dismissal upon motion for failure to state a claim upon which

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[4] 9 U.S.C. § 10 further provides in pertinent part:

Vacation—Grounds—Rehearing.—

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

relief can be granted, the exact language used by the court in its dismissal order. The defendants had filed no motions seeking relief in either form. The court was not however precluded, although it generally may be considered hazardous, from entering the order of dismissal on its own motion provided that sufficient basis for the court's action was otherwise apparent from the plaintiff's pleadings. For the purpose of testing the trial court's action, well pleaded allegations of the complaint are to be taken as admitted, but mere unsupported conclusions of fact or mixed fact and law are not admitted. *Hess v. Petrillo*, 259 F.2d 735 (7th Cir. 1958), *cert. denied*, 359 U.S. 954; *Homan Manufacturing Co. v. Russo*, 233 F.2d 547 (7th Cir. 1956). Since the relief sought was declaratory, that becomes another critical ingredient to be considered in judging the propriety of the dismissal. It has long been established that the grant of declaratory relief is discretionary. The appellate court may substitute its own judgment for that of the trial court if the trial court's exercise of that discretion is considered erroneous. *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942); *Sears, Roebuck & Co. v. American Mutual Liability Ins. Co.*, 372 F.2d 435 (7th Cir. 1967); *Cunningham Brothers Inc. v. Bail*, 407 F.2d 1165 (7th Cir. 1969), *cert. denied*, 359 U.S. 959.

The specific issues argued by Tamari are these:

1) What is the effect, if any, of Sec. 5a(11) of the Commodity Exchange Act, 7 U.S.C. § 7a(11) as amended, as applied to the arbitration proceedings in this case.

2) Was the CBOT estopped from arbitrating the underlying dispute.

3) Is there a factual basis for the district court's finding of a valid agreement to arbitrate.

4) Was there a procedural due process violation in the district court's dismissal.

5) Did the district court err in not finding a conflict of interest within CBOT affecting the arbitration proceeding.

6) Does Section 10 of the Federal Arbitration Act preclude the district court's consideration of allegations of misconduct by the arbitrators during the arbitration proceedings.

I.

The preliminary opinion of the district court directed that the arbitration proceedings continue, but Tamari argues that Section 7a(11) prohibited the CBOT from conducting the arbitration. The district court relied on Section 4a, note, the savings provision, providing that pending arbitration proceedings were not to be abated by the Section 5a(11) amendment. Tamari interprets the act as prohibiting arbitration of claims in excess of $15,000.00, and since the claims of Bache and counterclaim of Tamari each exceeds that limitation, Tamari argues the controversy could no longer be arbitrated. Tamari also leans heavily on *Wilko v. Swan*, 346 U.S. 427 (1953), a securities case, as analogous federal authority supporting the application of Section 7a(11) to this case to prevent arbitration. In *Wilko* the court held that an agreement for arbitration of any controversy that might arise in the future between the parties was void under Section 14 of the Securities Act of 1933 notwithstanding the provisions of the Arbitration Act. Section 14 of the Securities Act[5] provides that "any condition, stipulation, or provision binding any person acquiring a security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." The *Wilko* arbitration agreement was held, considering Congressional policy, to be a stipulation waiving the benefits of the Security Act and therefore void. Two justices dissented, refusing to find that the Section 14 anti-waiver provision was a general limitation on the Arbitration Act. The Commodity Exchange Act, however, has no provision comparable to Section 14 of the Securities Act of 1933. Tamari similarly cites *Danford v. Schwabacher*, 342 F.Supp. 65 (N.D. Calif. 1972), *appeal dismissed*, 488 F.2d 454 (9th Cir. 1974),

[5] 15 U.S.C. § 77n.

and *Laupheimer v. McDonnell & Co., Inc.*, 500 F.2d 21 (2d Cir. 1974), both securities cases. *Danford* and *Laupheimer* are cases in which the respective plaintiff each claimed to have been induced by fraud to become a partner or officer in brokerage firms in order for the firms to gain control over the customer account of each. Both firms were in financial difficulty and by joining the firms each plaintiff found himself thereby subject to arbitration agreements. Both cases refused to enforce the arbitration agreements in the subsequent disputes, but both cases turned on *Wilko's* interpretation of the Securities Act of 1933 with its Section 14 waiver provision with which we are not faced. The Securities Exchange Act of 1934 likewise contains a similar waiver provision, 15 U.S.C. 78cc(a).

No judicial interpretation has been cited or found interpreting Section 7a(11) in similar circumstances, except an interlocutory Memorandum and Order of the United States District Court for the Northern District of California in *Milani v. Conti-Commodity Service*, entered October 26, 1976, COMM. FUT. L. REP. (CCH) ¶ 20,227, and cited by Tamari.[6] However, we read that order as taking the view that Section 7a(11) does not prohibit compulsory arbitration agreements over and above or in addition to the arbitration requirements of the Act. *Milani* does, however, extend the *Wilko* rationale to commodities cases by holding that an agreement to arbitrate future commodity disputes is not enforceable. The Tamari complaint does not allege that particular deficiency, although it is argued. In any event we decline to legislate a Section 14 provision into the Commodities Act.

Bache does not read Section 7a(11) as prohibiting contract markets[7] from providing such other arbitration

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[6] This case is set for trial in the fall of 1977.

[7] Contract market is defined as an Exchange or Board of Trade where futures contracts are traded and so designated by the Secretary of Agriculture. A convenient glossary of terms used in commodity futures trading may be found at (1974) U.S. CODE CONG. & AD. NEWS 5891-94.

facilities as they may see fit and as may be agreed to in addition to what the act mandates. Such is also the view of the Commodity Futures Trading Commission.[8] Bache also relies on the Commission's view that Section 7a(11) does not preclude arbitration of customer claims in amounts in excess of $15,000,[9] and that arbitration proceedings on April 21, 1975, the effective date of the amendment, are not abated by Section 7a(11).[10] The administering agency's statutory construction is entitled to great deference, but independently we would have reached the same conclusion. *Kupiec v. Republic Federal Savings & Loan Association*, 512 F.2d 147 (7th Cir. 1975). In our view, for the reasons urged by Bache, Section 7a(11) is not applicable in any way, but even if it were, we view the proceedings as having been pending on April 21, 1975, and thus subject to the broad saving provision, Section 4a, note, as the district court held. Tamari alleges that on or about February 4, 1974, the dispute arose and was docketed with the CBOT Arbitration Committee prior to the date of the amendment. Thereafter, Tamari filed its own claim in the proceedings and evidence was heard. In our view the pending arbitration was not prohibited by the Act.[11]

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[8] CFTC Interpretation, COMM. FUT. L. REP. (CCH) ¶ 6507, p. 6304, Question (5) (40 Fed. Reg. 29121).

[9] CFTC Interpretative Bulletin, July 2, 1975 (FR Doc. 75-17885, filed 7-9-75).

[10] CFTC Letter No. 75-1; COMM. FUT. L. REP. (CCH) ¶ 20,-088.

[11] The dissent states that *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc.* 558 F.2d 831 (7th Cir. 1977), ought to control this case. *Weissbuch* is also a securities case under the Securities Exchange Act of 1934 which contains a waiver provision. *Weissbuch*, however, in extending *Wilko* to 10b-5 situations under the 1934 Act does so only after noting the absence of international concerns which were the decisive factor in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). In *Scherk*, the Supreme Court held that an international agreement containing an arbitration agreement was enforceable against a claim arising under Rule 10b-5 of the 1934 Act, declining to apply the *Wilko* rationale in such circumstance.

(Footnote continued on following page)

II.

Tamari also argues that estoppel should have barred CBOT from arbitrating the dispute because it vacillated over the meaning of the Section 7a(11) amendment to the Commodity Exchange Act. First CBOT, it is alleged, questioned its own jurisdiction and asked the parties for waivers which Tamari refused to provide. Then CBOT changed its opinion and decided to proceed with arbitration without waivers. In the meantime, Tamari filed the first of its suits, its alleged change of position. We see no merit in this contention. CBOT was not a party to the alleged agreement between the parties to arbitrate and did no more than by a legal opinion question for a short period of time its own jurisdiction under the recent amendment to the Act, a jurisdictional view which Tamari urges us to adopt. Tamari does not allege that CBOT acted fraudulently, with intended deception, or with culpable negligence. *Crary v. Dye*, 208 U.S. 515 (1907); *California State Board of Equalization v. Coast Radio Products*, 228 F.2d 520 (9th Cir. 1955). Tamari cites *Dickerson v. Calgrone*, 100 U.S. 578 (1880), to support its view, but that case also requires fraud or falsehood to justify estoppel. The good faith effort to interpret a new statutory amendment did not give rise to estoppel.

III.

Next Tamari attacks the finding expressed in the preliminary opinion by the district court that a valid agreement to arbitrate existed. The district court may have taken into consideration the allegations and exhibits in defendant's Petition to Stay the Proceedings

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[11] *continued*
The parties have not raised a similar international agreement issue, but it appears from the complaint the plaintiffs are residents of Lebanon and the defendants are corporations in the United States. It is further alleged that the transactions about which plaintiff complains were initiated in Lebanon and concluded in the United States. Thus, it appears following *Scherk* that the international aspects of the agreement and controversy further support the trial court's ruling.

Pending the Completion of the Arbitration which set forth an alleged exchange of cables between the parties agreeing to arbitrate which was subsequent to the original agreement to arbitrate. The cables purport to show the further development and consummation of the agreement to arbitrate. In the face of Tamari's allegations that its appearance at the arbitration resulted from the defendant's fraud and coercion, and attacking the original total agreement for fraud, the validity of the arbitration process was not subject to final resolution merely on the record as it then stood. The finding of a valid arbitration agreement was error, but harmless and it does not necessarily control the appropriateness of the dismissal. Since this case was dismissed, the order to arbitrate was of no effect.

Tamari argues that the alleged fraud and coercion leading to its presence at arbitration was a question to be resolved by the courts and not by arbitration. The original arbitration clauses providing that any controversies arising were to be settled by arbitration were only parts of two total agreements relating to the accounts. Tamari does not allege specifically that it agreed to the arbitration clause due to fraud. Tamari specifically, however, alleges that Bache's misrepresentations that Bache was expert in handling commodity futures trading, analyzing the market and forecasting trends, induced Tamari to enter into the agreements which contained the arbitration clauses. In addition, Tamari generally alleges that the submission of its claim and its appearance at arbitration was due to fraud and coercion. In the complaint filed in the first Tamari suit (a copy of which was attached and incorporated as an exhibit in this second suit), Tamari asked the court to rescind all the agreements between the parties and to award Tamari compensatory and exemplary damages and fees and costs. Under broad arbitration agreements the issue of fraud generally in inducing the complete principal agreement is a suitable matter for arbitration. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967); *Hamilton Life Ins. Co. of New York v. Republic National Life Ins. Co.*, 408 F.2d 606 (2d Cir. 1969).

In *Prima*, the court adheres to the view that "except where the parties otherwise intend—arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded, and where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." 388 U.S. at 402. The court notes that this view honors "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." Tamari does not allege that the arbitration clause was separate or that any legal issues which might arise were to be excluded from arbitration.

Tamari's alleged coerced appearance suggests some circumstances related to arbitration arising subsequent to the original agreements to arbitrate. Any such questions about the arbitration proceedings themselves are appropriate for the arbitration committee to consider and are in any event premature under the Arbitration Act. The district court could not find the arbitration agreement valid on the pleadings. That determination had to be left for arbitration of the total original contract, but it could take into consideration that the arbitration agreement itself had not been directly attacked in the complaint.

IV.

Next Tamari complains that the district court violated due process by its *sua sponte* dismissal of the complaint without notice and hearing. There was adequate notice contained in the Preliminary Opinion of April 21, 1976, in which it was stated that in the court's view the case should be dismissed as to the parties before that court. On May 19, 1976, without anything further being heard from Tamari, it was dismissed. The procedure was not ideal, but it is sufficient to withstand Tamari's attack.

V.

Tamari also argues that there was a conflict of interest within the CBOT which precluded fair arbitra-

tion. This arises from the alleged fact that Tamari itself had filed a complaint with another committee of CBOT charging Bache with violations of the Commodity Exchange Act and certain CBOT Rules and Regulations. Tamari then argues CBOT should not be both investigator and arbitrator. Part, at least, of any such alleged conflict was the result of Tamari's own action after the CBOT arbitration proceedings had been initiated. That complaint was filed with a separate committee, not the arbitration committee. We see no merit in this premature objection.

VI.

Finally, Tamari argues that there was misconduct in the arbitration proceedings as the arbitration committee was drawn from an interest group to which Bache, not Tamari, belonged and that Bache was powerful and influential in that group. It was the district court's view that that type of complaint was reviewable only under Section 10 of the Federal Arbitration Act. We agree.

VII.

The resolution of those particular issues framed by Tamari is sufficient to resolve the issue of dismissal. In addition, however, the dismissal may also be viewed as the exercise of the trial court's discretion in dismissing the one count complaint seeking declaratory relief. The question is not without some difficulty as the issues are clouded. With four separate federal cases and an arbitration proceeding growing out of the basic dispute, the litigation is fractured and in some disarray. It is not a good situation for the expeditious and efficient resolution of the underlying controversy. We attach no more significance to the district court's joint preliminary opinion so far as it may have applied to this case than to view it as showing in whole or in part what may have been considered by the court in the exercise of its discretion. To the extent that we can determine the basis of the trial court's ruling, we are bound to affirm even when that ruling may have been based upon an inappropriate ground or a wrong reason. *Sapp v. Renfroe*, 511 F.2d 172 (5th Cir. 1975).

Certain considerations are readily apparent from Tamari's complaint. First, as Tamari alleges, the dispute between Tamari and Bache was docketed with the Arbitration Committee of CBOT on or about February 4, 1974. In that proceeding Tamari sought to recover $2,150,000 from Bache and Bache sought to recover $376,366.96 from Tamari. Tamari rext filed with the Business Conduct Committee of CBOT a complaint against Bache alleging substantially the same losses. Tamari then filed its first suit on December 10, 1975, for the same $2,150,000 damages plus exemplary damages and costs. The CBOT Arbitration Committee, after consideration of jurisdictional problems, proceeded to take evidence on December 11, 1975. Then during the arbitration proceedings, on January 6, 1976, Tamari filed this second suit to halt the arbitration. Therefore, at that point Tamari was already engaged in three proceedings over the same dispute, one federal case (not counting the present suit), one arbitration proceeding and one other complaint with CBOT.

"The pendency of another action involving the same set of circumstances has often been of determinative importance in the exercise of judicial discretion." (6A MOORE'S FEDERAL PRACTICE ¶ 57.08[6-1] (2nd ed. 1974)). That has been recognized as a decisive judicial discretion factor in this circuit even where the parties in the other pending action were not the same as the parties in the dismissed action. *National Health Federation v. Weinberger*, 518 F.2d 711 (7th Cir. 1975). See also *Abbott Laboratories v. Gardner*, 387 U.S. 130, 155 (1967); *Samuels v. Mackell*, 401 U.S. 66, 70. We do not adhere to a chronological test rigidly applied, but it may be one of other factors affecting discretion. *Chicago Furniture Forwarding Co. v. Bowles*, 161 F.2d 411 (7th Cir. 1947). We are concerned with whether or not the declaratory relief sought "will more fully serve the needs and convenience of the parties and provide a comprehensive solution of the general conflict." (10 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2758 at 779 (1973)). In our view the declaratory relief sought could not meet that test. It could not provide a comprehensive solution of the underlying dispute nor any substantial part of it.

The basic dispute would remain unresolved. *Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952). The court may also in the exercise of its discretion consider that "the wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum." *American Automobile Ins. Co. v. Freundt*, 103 F.2d 613, 617 (7th Cir. 1939). Further, the district court lacked authority to interfere with arbitration proceedings already in progress. The power of the district court to review arbitration proceedings is governed by Section 10 of the Federal Arbitration Act. The fourth suit filed by Tamari on January 27, 1977, in the district court and now pending, seeks to review and set aside that arbitration award. We do not favor a "piecemeal trial." *TRW, Inc. v. Ellipse Corp.*, 495 F.2d 314 (7th Cir. 1974).

In reviewing the exercise of discretion by the district court, we adhere to the standard adopted in *Beshear v. Weinzapfel*, 474 F.2d 127 (7th Cir. 1973).

> Generally, an appellate court may set aside a trial court's exercise of discretion only if the exercise of such discretion could be said to be arbitrary. [D]iscretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. (citations omitted)

In the particular circumstances of this case, we find no abuse of discretion under the applicable standard.

WE AFFIRM.

SWYGERT, *Circuit Judge*, dissenting. I respectfully dissent. The crucial issue in this case is whether Tamari should be compelled to comply with the agreement to arbitrate disputes which was part of the contracts it signed upon opening two accounts with Bache. The contracts, one of which is reproduced on pages 19 and 20 of this opinion, were printed form documents which were obviously used by Bache for every account opened by a customer. The arbitration clause, which is paragraph 14 of the contract, was not the result of arm's length bargaining between Tamari and Bache. Rather, it is apparent that the arbitration clause was a mandatory feature of Bache's standard customer agreement, and that a customer could not purchase commodities futures through Bache unless he agreed to it.[1]

The issue of whether to enforce a contract of adhesion between parties of unequal bargaining power is a difficult one. *See, e.g., Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). I am convinced, however, that under the circumstances of this case the agreement to arbitrate should not be enforced.

The gravamen of Tamari's complaint is that Bache committed fraudulent acts which violated the Commodity Exchange Act. The antifraud provisions of the Act, 7 U.S.C. §§ 6b, 6*o*, are designed to protect individual investors in a complex area of the financial world where they easily can be cheated by sophisticated insiders. The legislative history of the most recent amendments to the Act makes clear that one of the Act's primary purposes is to protect the public:

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[1] Even if the assumption that these were adhesion contracts was open to serious question, which I doubt, we must assume that the set of facts most favorable to Tamari is true because this case was decided on a motion to dismiss.

PLEASE READ BOTH SIDES BEFORE SIGNING

BACHE & Co.
INCORPORATED

CUSTOMER'S AGREEMENT

1. I agree as follows with respect to all of my accounts, in which I have an interest, now or with others, which I have opened or open on the future, with you for the purchase and sale of securities and commodities:

2. I am of full age and represent that I am not an employee of any exchange or of a Member Firm of any Exchange or the NASD, or of a bank, trust company, or insurance company and that I will promptly notify you if I become so employed.

3. All transactions for my account shall be subject to the constitution, rules, regulations, customs and usages, as the same may be constituted from time to time, of the exchange or market (and its clearing house, if any) where executed.

4. Any and all credit balances, securities, commodities or contracts relating thereto, and all other property of whatsoever kind belonging to me or in which I may have an interest held by you or carried for my accounts shall be subject to a general lien for the discharge of my obligations to you (including unmatured and contingent obligations) however arising and without regard to whether or not you have made advances with respect to such property and without notice to me may be carried in your general ledger and all securities may be pledged, repledged, hypothecated or re-hypothecated, separately or in common with other securities or any other property, for the sum due to you thereon or for a greater sum and without retaining in your possession and control for delivery a like amount of similar securities or other property. At any time and from time to time you may, in your discretion, without notice to me, apply and/or transfer any securities, commodities, contracts relating thereto, cash or any other property therein, interchangeably between any of my accounts, whether individual or joint or for any of my accounts to any account guaranteed by me. You are specifically authorized to transfer to my cash account on the settlement day following a purchase entered in that account, excess funds available in any of my other accounts, including but not limited to any free balances in any margin account or in any non-margined commodities account, sufficient to make full payment of this cash purchase. I agree that any debit occurring in any of my accounts may be transferred by you at your option to my margin account.

5. I will maintain such margins as you may in your discretion require from time to time and will pay on demand any debit balance owing with respect to any of my accounts. Whenever in your discretion you deem it desirable for your protection, (and without the necessity of a margin call) including but not limited to an instance where a petition in bankruptcy or for the appointment of a receiver is filed by or against me, or an attachment is levied against my account, or in the event of notice of my death or incapacity, or in compliance with the orders of any Exchange, you may, without prior demand, tender, and without any notice of the time or place of sale, all of which are expressly waived, sell any or all securities, or commodities or contracts relating thereto which may be in your possession, or which you may be carrying for me, or buy any securities, or commodities or contracts relating thereto of which my account or accounts may be short, in order to close out in whole or in part any commitment in my behalf or you may place stop orders with respects to such securities or commodities and such sale or purchase may be made at your discretion on any Exchange or other market where such business is then transacted, or at public auction or private sale, with or without advertising and no demands, calls, tenders or notices which you may make or give in any one or more instances shall invalidate the aforesaid waivers on my part. You shall have the right to purchase for your own account any or all of the aforesaid property at any such sale, discharged of any right of redemption, which is hereby waived.

6. All orders for the purchase or sale of commodities for future delivery may be closed out by you as and when authorized or required by the Exchange where made. Against a "long" position in any commodity contract, prior to maturity thereof, and at least five business days before the first notice day of the delivery month, I will give instructions to liquidate, or place you in sufficient funds to take delivery; and in default thereof, or in the event such liquidating instructions cannot be executed under prevailing conditions, you may, without notice or demand, close out the contracts or take delivery and dispose of the commodity upon any terms and by any method which may be feasible. Against a "short" position in any commodity contract, prior to maturity thereof, and at least five business days before the last trading day of the delivery month, I will give you instructions to cover, or furnish you with all necessary delivery documents; and in default thereof, you may without demand or notice, cover the contracts, or if orders to buy in such contracts cannot be executed under prevailing conditions, you may procure the actual commodity and make delivery thereof upon any terms and by any method which may be feasible.

7. All transactions in any of my accounts are to be paid for or required margin deposited no later than 2:00 p.m. on the settlement date.

8. I agree to pay interest and service charges upon my accounts monthly at the prevailing rate as determined by you.

9. I agree that, in giving orders to sell, all "short" sale orders will be designated as "short" and all "long" sale orders will be designated as "long" and that the designation of a sell order as "long" is a representation on my part that I own the security and, if the security is not in your possession that it is not then possible to deliver the security to you forthwith and I will deliver it on or before the settlement date.

10. Reports of the execution of orders and statements of my account shall be conclusive if not objected to in writing within five days and ten days, respectively, after transmittal to me by mail or otherwise.

CUSTOMER'S AGREEMENT	ACCOUNT NAME (HEREIN REFERRED TO AS I)	OFFICE	ACC. NO.	R.R.	DATE
		NP	01564	16	197- May, 20th

11 All communications including margin calls may be sent to me at my address given you, or at such other address as I may hereafter give you in writing, and all communications so sent, whether in writing or otherwise, shall be deemed given to me personally, whether actually received or not.

12 No waiver of any provision of this agreement shall be deemed a waiver of any other provision, nor a continuing waiver of the provision or provisions so waived.

13 I understand that no provision of this agreement can be amended or waived except in writing signed by an officer of your Company, and that this agreement shall continue in force until its termination by me is acknowledged in writing by an officer of your Company, or until written notice of termination by you shall have been mailed to me at my address last given you.

14 This contract shall be governed by the laws of the State of New York, and shall inure to the benefit of your successors and assigns, and shall be binding on the undersigned, his heirs, executors, administrators and assigns. Any controversy arising out of or relating to my account, to transactions with or for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then obtaining of either the American Arbitration Association or the Board of Governors of the New York Stock Exchange as I may elect, except that any controversy arising out of or relating to transactions in commodities or contracts relating thereto, whether executed or to be executed within or outside of the United States shall be settled by arbitration in accordance with rules then obtaining of the Exchange (if any) where the transaction took place, if within the United States, and provided such Exchange has arbitration facilities or under the rules of the American Arbitration Association as I may elect. If I do not make such election by registered mail addressed to you at your main office within five days after demand by you that I make such election, then you may make such election. Notice preliminary to, in conjunction with, or incident to such arbitration proceeding, may be sent to me by mail and personal service is hereby waived. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof, without notice to me.

15. If any provision hereof is or at any time should become inconsistent with any present or future law, rule or regulation of any securities or commodities exchange or of any sovereign government or a regulatory body thereof and if any of these bodies have jurisdiction over the subject matter of this agreement, said provision shall be deemed to be superseded or modified to conform to such law, rule or regulation, but in all other respects this agreement shall continue and remain in full force and effect.

DATE _____ CUSTOMER'S SIGNATURE Faulk, Tarman & Sons Co.
Faulk, Tarman & Sons Co.

LENDING AGREEMENT

YOU AND ANY FIRM SUCCEEDING TO YOUR FIRM ARE HEREBY AUTHORIZED FROM TIME TO TIME TO LEND SEPARATELY OR TOGETHER WITH THE PROPERTY OF OTHERS EITHER TO YOURSELVES OR TO OTHERS ANY PROPERTY WHICH YOU MAY BE CARRYING FOR ME ON MARGIN. THIS AUTHORIZATION SHALL APPLY TO ALL ACCOUNTS CARRIED BY YOU FOR ME AND SHALL REMAIN IN FULL FORCE UNTIL WRITTEN NOTICE OF REVOCATION IS RECEIVED BY YOU AT YOUR PRINCIPAL OFFICE IN NEW YORK.

DATE _____ CUSTOMER'S SIGNATURE Faulk, Tarman & Sons Co.
Faulk, Tarman & Sons Co.

SIGN IN BOTH PLACES

KINDLY SIGN THIS FORM IN THE TWO SIGNATURE SPACES INDICATED ABOVE. IN THE CASE OF JOINT ACCOUNTS, BOTH TENANTS SHOULD SIGN IN BOTH SIGNATURE SPACES. RETURN THIS ORIGINAL (WHITE) TO THE BRANCH OFFICE WHICH SERVICES YOUR ACCOUNT. THE DUPLICATE (BUFF) SHOULD BE RETAINED FOR YOUR PERSONAL RECORDS.

FORM 1241 C-2 (1-66)

PLEASE READ BOTH SIDES BEFORE SIGNING

PRINTED IN U. S. A.

> The present Commodity Exchange Act is predicated upon findings and conclusions of the Congress that (1) transactions in commodity futures are carried on in large volume by the public, as well as by persons engaged in the business of buying and selling agricultural commodities in interstate commerce, and (2) such transactions and prices are susceptible to speculation, manipulation and control, and sudden and unreasonable price fluctuations, and such fluctuations are a burden upon interstate commerce and make regulation essential in the public interest. A fundamental purpose of the Commodity Exchange Act is to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves. S. Rep. No. 93-1131, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Ad. News 5843, 5856.

Given the congressional mandate to protect the individual commodities investor, the courts should not permit the dismissal of complaints alleging fraud by a commodities broker on the basis of an adhesion contract drafted by that broker. We can be confident that, if the commodities brokers as a class can compel the arbitration of antifraud claims rather than litigating them in court, they will do so. The arbitrators before whom the complaints would be filed would also be insiders in the commodities industry, and would tend to be more tolerant of questionable practices by brokers than would a judge who is an outsider to the field. But the individual investor is entitled to have his claim decided by an outsider. It contravenes the spirit of the Act and undermines its remedial purposes to remand the investor who contends a broker has committed fraud to a committee composed of other brokers on the basis of an arbitration clause in an adhesion contract.

It was precisely this problem which motivated the Supreme Court's decision in *Wilko v. Swan*, 346 U.S. 427 (1953). The majority distinguishes *Wilko* because

there is no analogue in the Commodity Exchange Act to section 14 of the Securities Act of 1933. But it is clear from the opinion in *Wilko* that a major underpinning of the Court's holding was also the vulnerability of an individual investor to being manipulated by insiders in the securities industry. 346 U.S. at 435.

Moreover, this court has recently extended the broad policy of investor protection contained in *Wilko* to a case in which section 14 of the Securities Act was not implicated. In *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831 (7th Cir. 1977), the issue was whether plaintiffs' claim that defendant violated Rule 10b-5 promulgated under the Securities Exchange Act of 1934 had to be dismissed because an agreement to arbitrate all disputes was contained in the adhesion contract which plaintiffs signed upon opening their account with defendant. We noted that *Wilko* was distinguishable because the private right of action under Rule 10b-5 was judicially created, while the private right of action under section 12(a) of the Securities Act is explicitly provided for by the statute. Therefore, the Securities Exchange Act lacks the "special right" which the *Wilko* Court held existed under the Securities Act and could not be waived under section 14 of that Act. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 513-14 (1974).[2] Nonetheless, we refused to enforce the arbitration clause because it was not the product of actual bargaining between the parties and enforcement would undermine the policy contained in the Securities Exchange Act of protecting the individual investor who "is most vulnerable to securities swindles." 558 F.2d at 835.

---

[2] The majority asserts that *Scherk* mandates enforcement of an arbitration agreement whenever "international concerns" are involved. This reading stretches *Scherk* well beyond the range of cases to which the Supreme Court intended it to apply. The holding of *Scherk* was that in a truly international contract, one "touching two or more countries, each with its own substantive laws and conflict-of-law rules," the failure to enforce an arbitration agreement would unfairly exalt American law of other countries. 417 U.S. at 516. This case does not pose the problem of a conflict between American law and foreign law. The contract negotiated by Tamari and Bache involved purely American business dealings, and it is clear that the parties intended American law to govern any disagreement.

Our conclusion in *Weissbuch* was previously reached by other courts which have considered the identical issue. *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532, 536 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976); *Macchiavelli v. Shearson, Hammill & Co.*, 384 F. Supp. 21, 27-28 (E.D. Cal. 1974). In addition, *Wilko* has been extended to the antitrust area, in which no analogue to section 14 exists. *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970).

In my judgment *Weissbuch* ought to control the case at bar. There is no logical way to distinguish the plight of the individual securities investor and the individual commodites investor. Both are vulnerable to fraudulent schemes perpetrated by industry insiders. Congressional concern for the individual investor is no greater in the Securities Exchange Act than it is in the Commodity Exchange Act. Finally, the danger that arbitration will frustrate the intent of Congress is no greater in the securities industry than it is in the commodities industry. I therefore agree with the court in *Milani v. ContiCommodity Services, Inc.*, [1976] Commodity Futures L. Rep. (CCH) ¶ 20,227 (N.D. Cal. 1976), that enforcement of arbitration agreements such as the one in the case at bar would undermine the scheme of investor protection which Congress has enacted in the Commodity Exchange Act.

The Commodities Futures Trading Commission has recognized the unfairness of allowing brokers to utilize adhesion contracts to provide for compulsory arbitration of customer grievances. As early as 1975, the Commission issued an interpretative statement which discussed proposed amendments to the rules which the Commission is authorized to promulgate under the Act, and stated:

> As already noted, one factor leading to passage of the CFTC Act was allegations made in court cases and newspaper articles that the arbitration procedures of contract markets had been unfairly applied. The Commission believes that the procedural protections contained in the amended proposed rules will prevent the possibility of abuses such as those alleged in the congressional hearings.

> The voluntary nature of procedures established by contract markets is a central part of this protection. *A contract of adhesion, or an uninformed waiver of rights, is not a voluntary agreement, as customers may not be fully cognizant of the effects of an agreement to arbitrate until the claim or grievance arises.* The amended proposed rule, therefore, provides that the parties' agreement to submit the claim or grievance to the procedure must have been made after the claim or grievance arose. [1976] Commodity Futures L. Rep. (CCH) ¶ 20, 111, at 20,805 (emphasis added).

The Commission has now established a rule which generally prohibits the arbitration of grievances unless the customer agrees to arbitrate after the time the grievance has arisen. 17 C.F.R. § 180.3(a).[3] The rule per-

[3] 17 C.F.R. § 180.3 provides, in relevant part:

Voluntary Procedure and Compulsory Payments.

(a) The use by customers of the dispute settlement procedures established by contract markets pursuant to the Act or this Part or of the arbitration or other dispute settlement procedures specified in an agreement under paragraph (b)(3) of this section shall be voluntary. The procedures so established shall prohibit any agreement or understanding pursuant to which customers of members of the contract market agree to submit claims or grievances for settlement under said procedures prior to the time when the claim or grievance arose, except in accordance with paragraph (b) of this section.

(b) No futures commission merchant, floor broker or associated person shall enter into any agreement or understanding with a customer in which the customer agrees, prior to the time the claim or grievance arises, to submit such claim or grievance to any settlement procedure except as follows:

(1) Signing the agreement must not be made a conditon for the customer to utilize the services offered by the futures commission merchant, floor broker or associated person;

(2) If the agreement is contained as a clause or clauses of a broader agreement, the customer must separately endorse the clause or clauses containing the cautionary language and other provisions specified in this section;

(Footnote continued on following page)

mits compulsory arbitration to be provided for in the initial contract between the broker and the customer only if: (1) agreeing to compulsory arbitration is not a

[3] *continued*

(3) The agreement may not require the customer to waive the right to seek reparations under Section 14 of the Act and Part 12 of these regulations. Accordingly, the customer must be advised in writing that he or she may seek reparations under Section 14 of the Act by an election made within 45 days after the futures commission merchant, floor broker or associated person notifies the customer that arbitration will be demanded under the agreement. This notice must be given at the time when the futures commission merchant, floor broker or associated person notifies the customer of an intention to arbitrate. The customer must also be advised that if he or she seeks reparations under Section 14 of the Act and the Commission declines to institute reparation proceedings, the claim or grievance will be subject to the preexisting arbitration agreement and must also be advised that aspects of the claims or grievances that are not subject to the reparations procedure (*i. e.* do not constitute a violation of the Act or rules thereunder) may be required to be submitted to the arbitration or other dispute settlement procedure set forth in the preexisting arbitration agreement.

(4) The customer agreement must contain cautionary language, printed in large boldface type, to the following effect:

WHILE THE COMMODITY FUTURES TRADING COMMISSION (CFTC) RECOGNIZES THE BENEFITS OF SETTLING DISPUTES BY ARBITRATION, IT REQUIRES THAT YOUR CONSENT TO SUCH AN AGREEMENT BE VOLUNTARY. YOU NEED NOT SIGN THIS AGREEMENT TO OPEN AN ACCOUNT WITH [name]. See 17 CFR 180.1-180.6.

BY SIGNING THIS AGREEMENT, YOU MAY BE WAIVING YOUR RIGHT TO SUE IN A COURT OF LAW, BUT YOU ARE NOT WAIVING YOUR RIGHT TO ELECT AT A LATER DATE TO PROCEED PURSUANT TO SECTION 14 OF THE COMMODITY EXCHANGE ACT TO SEEK DAMAGES SUSTAINED AS A RESULT OF A VIOLATION OF THE ACT. IN THE EVENT A DISPUTE ARISES, YOU WILL BE NOTIFIED IF [name] INTENDS TO

(Footnote continued on following page)

prerequisite to using the broker's services; (2) the customer separately endorses the compulsory arbitration clause; (3) the contract contains boldface type warning the customer that he need not agree to compulsory arbitration of disputes in order to use the broker's services. 17 C.F.R. § 180.3(b).

If this rule were applicable to the case at bar, the district court's judgment would have to be reversed, because the compulsory arbitration clause contained in the contracts between Tamari and Bache does not satisfy the requirements of 17 C.F.R. § 180.3(b). Admittedly, the rule is inapplicable because as finally amended it did not become effective until January 18, 1977. But it strikes me as unfair to penalize Tamari simply because the rule was not yet in effect at the time Tamari entered its relationship with Bache. The principle underlying the rule is that it is always unfair for a broker to coerce a customer into agreeing to the compulsory arbitration of grievances through the use of adhesion contracts. That principle was as valid in 1972, when the contracts were signed, as it is now. It would in no way defeat Bache's legitimate expectations to refuse to enforce the arbitration clause. What the rule makes clear is that Bache never had a legitimate right to coerce its customers into agreeing to compulsory arbitration.

In my opinion, we should use our equitable powers to bridge the remedial gap which now exists for commodities transactions entered into before January 18,

---

[3] *continued*

SUBMIT THE DISPUTE TO ARBITRATION. IF YOU BELIEVE A VIOLATION OF THE COMMODITY EXCHANGE ACT IS INVOLVED AND IF YOU PREFER TO REQUEST A SECTION 14 "REPARATIONS" PROCEEDING BEFORE THE CFTC, YOU WILL STILL HAVE 45 DAYS IN WHICH TO MAKE THAT ELECTION.

(5) If the agreement specifies a forum for settlement other than a procedure established pursuant to section 5a(11) of the Act or this Part, the procedures of such forum must comply with the requirements of § 180.5 of this Part.

1977. As I have already noted, I would refuse to enforce the compulsory arbitration clause even in the absence of a CFTC rule. Given the existence of the rule, I believe that the majority's disposition of this case also contravenes the well-established policy that we should defer to the expertise of the administrative agency to which Congress has entrusted the regulation of a particular field.

I therefore would reverse the district court's order dismissing this action. Unless Tamari agreed to arbitration after the time its dispute with Bache arose, it should be permitted to present its claims to the district court. As the majority correctly points out, however, whether Tamari did so is a disputed issue of fact which should not be decided on a motion to dismiss.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4272—Midwest Law Printing Co., Inc., Chicago—10-19-77—275

Supreme Court, U. S.
FILED

No. 80-110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABDALLAH W. TAMARI, LUDWIG W. TAMARI AND FARAH W. TAMARI, CO-PARTNERS DOING BUSINESS AS WAHBE TAMARI & SONS CO.,

Petitioners,

vs.

BACHE HALSEY STUART SHIELDS, INCORPORATED, A DELAWARE CORPORATION (FORMERLY KNOWN AS BACHE HALSEY STUART, INC. AND ALSO FORMERLY KNOWN AS BACHE & CO., INCORPORATED),

Respondent.

BRIEF FOR RESPONDENT, BACHE HALSEY STUART SHIELDS, INCORPORATED, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

N. A. GIAMBALVO,
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QUESTIONS PRESENTED

The case does not present any questions worthy of review by this Court.

The only questions presented by this case are:

1. Whether the petition should be denied because the decision of the court below is correct and in conformity with the decisions of this Court and of other courts.

2. Whether the petition should be denied because the decision of the court below is correct and in conformity with the accepted and usual course of judicial proceedings.

3. Whether the petition should be denied because the issues raised are barred in whole or in part under the doctrines of *res judicata* and waiver.

4. Whether the petition should be denied because the decision below affects only the private parties to this litigation, and does not involve any important principle of law or matter of public policy.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-110

ABDALLAH W. TAMARI, LUDWIG W. TAMARI AND FARAH W. TAMARI, CO-PARTNERS DOING BUSINESS AS WAHBE TAMARI & SONS CO.,

Petitioners,

vs.

BACHE HALSEY STUART SHIELDS, INCORPORATED, A DELAWARE CORPORATION (FORMERLY KNOWN AS BACHE HALSEY STUART, INC. AND ALSO FORMERLY KNOWN AS BACHE & CO., INCORPORATED),

Respondent.

BRIEF FOR RESPONDENT, BACHE HALSEY STUART SHIELDS, INCORPORATED, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent prays that the petition for a writ of certiorari be denied.

STATEMENT OF THE CASE

Preliminary Statement

The petition urges this court to grant a writ of certiorari for two reasons. First, the decision of the court below is purportedly at odds with the decision of this Court and other courts on the issue of arbitrator bias. Tamaris argue that the arbitration panel was biased because the employer of one of the seven (7) arbitrators hired a Bache employee who had testified as to perfunctory and uncontested matters at the arbitration hearings. Tamaris also argue that the arbitrators had a vested interest in deciding whether the Tamaris voluntarily agreed to arbitrate because the arbitrators were associated with the Chicago Board of Trade ("CBOT"). Secondly, Tamaris urge that the decision of the court below departed from the accepted and usual course of judicial proceedings by accepting as true statements appearing in exhibits to the complaint when the statements were purportedly inconsistent with well pleaded allegations.

Petitioners' statement of the case omits material facts concerning the issues presented and, further, contains inaccuracies. Respondent therefore respectfully submits the following statement of the case.

History of the Prior Litigation

In 1973, a dispute arose between Tamaris, the petitioners, and Bache, the respondent, concerning two commodity accounts maintained by Tamaris with Bache's branch office in Beruit, Lebanon. The Tamaris and Bache agreed to arbitrate their dispute before the "CBOT". Bache filed its arbitration complaint against Tamaris seeking recovery of the amount of a debit balance remaining in Tamaris' commodity accounts. Tamaris, in turn, filed an answer and also a counterclaim. The counter-

claim alleged that Bache mismanaged the accounts. An arbitration award was entered in favor of Bache and against the Tamaris covering the debit balance in the accounts, and Tamaris' counterclaim was dismissed (Pet. App. F, ¶¶ 11, 14, 59-60).

While the arbitration proceedings were pending, Tamaris filed a series of lawsuits and administrative proceedings against Bache. They filed complaints with the Commodity Futures Trading Commission and the CBOT Business Conduct Committee. They obtained no relief on either complaint. They also filed four separate lawsuits in the district court in an attempt to stay and overturn the arbitration proceedings on various grounds. Tamaris were denied relief in each of those lawsuits. The petition here concerns the fourth of these lawsuits. The lawsuits are described below.

The First Lawsuit-Tamari I

On December 10, 1975, the Tamaris filed their first lawsuit against Bache, entitled *Tamari, et al.* v. *Bache, et al.*, Case No. 75 C 4189 (N. D. Ill.). Their complaint alleged the same things their arbitration counterclaim alleged. In addition to money damages, the Tamaris requested an injunction enjoining Bache from "having the cause adjudicated in any other forum".

On April 21, 1976, the district court entered a preliminary opinion finding that Bache and the Tamaris had entered into a valid agreement to arbitrate their dispute and indicating that the Tamaris would be ordered to continue to arbitrate. On May 19, 1976, the district court entered an order which dismissed the action against Bache and ordered the Tamaris to arbitrate. On June 16, 1976, the Tamaris filed a notice of appeal from the May 19, 1976 order. That appeal was dismissed on September 23, 1976 on Tamaris' own motion to remand.

Tamari I is still pending against Bache & Co. (Lebanon) S. A. L., a foreign subsidiary of Bache.

The Second Lawsuit-Tamari II

On January 6, 1976, while their first lawsuit was pending, the Tamaris filed their second lawsuit against Bache entitled *Tamari, et al.* v. *Bache et al.*, Case No. 76 C 21 (N. D. Ill.). The CBOT was also named as a defendant.

The complaint alleged that the provision requiring arbitration in the customer's agreement that they had signed was invalid under 1974 amendments to the Commodity Exchange Act, 7 U. S. C. § 1 *et seq.*, and under regulations subsequently adopted by the Commodity Futures Trading Commission ("CFTC"). Tamaris also urged that the CBOT lacked authority to arbitrate the dispute.

On May 19, 1976, the district court dismissed the action for failure to state a claim upon which relief could be granted. The district court's order was affirmed in *Tamari* v. *Bache & Co. (Lebanon) S. A. L.*, 565 F. 2d 1194 (7th Cir. 1977). In affirming, the Seventh Circuit held among other things: (i) that the 1974 amendments to the Commodity Exchange Act and the regulations adopted pursuant thereto did not invalidate Tamaris' agreement to arbitrate the dispute; and (ii) that Tamaris were required to arbitrate their dispute with Bache before the CBOT (Pet. App. G, pp. A62-67).

Tamaris' petition to this court for a writ of *certiorari* in Tamari II was denied, 435 U. S. 905 (1978).

The Third Lawsuit-Tamari III

On June 6, 1976, the Tamaris filed a third lawsuit entitled *Tamari, et al.* v. *Conrad, et al.*, Case No. 76 C 2071 (N. D. Ill.), involving the same subject matter as Tamari II. In Tamari III, the complaint named each of the individual arbitrators as defendants. Bache was granted leave to intervene.

On November 15, 1976, the district court dismissed the action. On April 12, 1977, the Seventh Circuit affirmed, *Tamari* v. *Conrad*, 552 F. 2d 778 (7th Cir. 1977).

The Present Case

The complaint in this fourth lawsuit sought to vacate the arbitration award entered against Tamaris and in favor of Bache. Transcripts of the arbitration proceedings were attached as an exhibit to the complaint and incorporated by reference (Pet. App. F, ¶ 32(s)). The district court dismissed the complaint for failure to state a claim upon which relief could be granted and the court below affirmed (Pet. App. A-D).

The Complaint

The allegations of the complaint, in so far as they are pertinent to the issues raised in the petition here, are as follows:

The Tamaris are citizens and residents of Lebanon. They are engaged in the business of importing and wholesaling food products in Jordan, Lebanon and other countries (April 18, 1976 Tr.* pp. 64-5). On May 20, 1972 and on September 22, 1972, respectively, the Tamaris opened two commodity accounts with Bache at Bache's branch office in Beruit, Lebanon. Upon opening the accounts, Tamaris executed customer agreements, which provided that Tamaris and Bache would arbitrate any dispute concerning the commodity accounts before the exchange on which the disputed trades were made *or* before the American Arbitration Association. Tamaris could choose the forum (Pet. App. F, ¶ 7; Complaint, Ex. A).

In 1973, a dispute arose between Tamaris and Bache. On January 9, 1974, Bache notified Tamaris that they owed it $376,366.96 (which was the amount of the debit balances in the Tamaris' accounts) and that Bache desired to arbitrate the matter. Bache requested Tamaris to elect either the New York Stock Exchange or the American Arbitration Association as the arbitration forum (Pet. App. F, ¶ 9; Complaint, Ex. D).

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* "Tr." refers to the arbitration transcripts of proceedings which were attached as an exhibit to the complaint. Under Rule 10(c), Federal Rules of Civil Procedure, a document "which is an exhibit to a pleading is a part thereof for all purposes."

Several days later, Tamaris notified Bache by telegram (Pet. App. F, ¶ 10; Complaint, Ex. E):

> "We accept arbitration in accordance with the terms of the customers agreement concluded with your principals stop Pursuant to Clause 14 of the said agreement we request that the arbitration should take place in accordance with the rules of the exchange where our commodities transactions took place namely the Chicago Board of Trade stop We further request that the arbitration proceedings should include a claim of two million one hundred and fifteen thousand US dollars. . . ."

On February 8, 1974, Bache filed its arbitration complaint against Tamaris seeking recovery of the amount of the debit balances remaining in their commodity accounts (Pet. App. F, ¶ 11).

On April 27, 1974, Tamaris executed a submission agreement in which they again agreed to arbitrate their dispute with Bache before the CBOT (Pet. App. F, ¶ 12; Complaint, Ex. G). The submission agreement provided in part:

> "CHICAGO BOARD OF TRADE
>
> Arbitration Form
>
> WHEREAS, Differences and controversies are now existing and pending between Bache & Co. Incorporated, and Wahbe Tamari & Sons and Wahbe Tamari & Sons Co. in relation to business transactions.
>
> Now we, the undersigned Wahbe Tamari & Sons and Wahbe Tamari & Sons Co. and Bache & Co. Incorporated aforesaid, desiring to avoid proceedings in the courts, do hereby mutually agree to submit the said differences and controversies for decision, in accordance with the rules of the Board of Trade of the City of Chicago to a quorum of the present 'Committee of Arbitration' elected by said Board of Trade, or to substitutes for members of said Committee, as the case may be. . . ."

On September 17, 1974, the Tamaris filed an answer and a counterclaim in the arbitration proceedings seeking in excess of

$2 million (Pet. App. F, ¶ 13). Shortly thereafter, in November, 1974, Tamaris and Bache met with legal counsel for the CBOT concerning procedural matters and discovery, and a discovery schedule was set (December 11, 1975 Tr. p. 45; January 26, 1976 Tr. pp. 22-24). The arbitrators subsequently met with the parties on October 16 and 30, 1975 concerning procedural matters, and the first evidentiary hearing was set for December 11, 1975. Later hearings were held on January 7, 1976, January 14, 1976, January 26, 1976, February 11, 1976, February 12, 1976, March 2, 1976, March 9, 1976, April 7, 1976, April 8, 1976 and May 17, 1976 (Pet. App. F, ¶¶ 18, 20 and 31).

At the start of the April 7, 1976 hearing, the arbitrators informed the parties that since the last hearing, Mr. Fivian resigned working for Bache and that he would in the near future go to work for Heinhold Company. Mr. Klopfenstein, an arbitrator, was a vice-president of Heinhold (April 7, 1976 Tr. pp. 1-2).

Fivian, a vice president of Bache working out of Bache's Chicago office, had testified before the arbitrators on February 11, 1976, February 12, 1976 and March 9, 1976. His testimony focused almost entirely on the identification of documents and the internal operation of Bache's office. Fivian appeared before the arbitrators to testify because he had been designated by Bache to respond on its behalf to Tamaris' subpoena to produce documents. He was not an occurrence witness. His testimony did not relate to disputed issues of material fact (February 11, 1976 Tr. p. 30; February 12, 1976 Tr. pp. 5-74; March 9, 1976 Tr. pp. 21-68; Pet. App. A, p. A6).

The arbitrators stated that if there was any objection to Klopfenstein's staying on the arbitration panel, he would withdraw. The arbitrators asked Tamaris if they wanted any background on the nature of the employment and afforded Bache and Tamaris a full opportunity to question both Klopfenstein and Fivian (April 7, 1976 Tr. p. 2).

In response to questions, Fivian stated that an executive search firm initiated the negotiations with Heinhold. Starting sometime in February, he had several negotiations with Heinhold management in DaKalb, Illinois. He had no conversations with Klopfenstein. He was hired on March 16, 1976 and was to start work on April 15, 1976. Bache was first notified of Fivian's new employment on March 29, 1976 (April 7, 1976 Tr. pp. 3-5). The arbitrators, without exception, first learned of Fivian's new employment on April 7, 1976 (April 7, 1976 Tr. pp. 4-5 and 14).

The arbitrators informed both parties that they had not discussed Fivian's testimony, that they had not made any decisions based upon Fivian's testimony, and that Klopfenstein thus had no influence on them with respect to Fivian's testimony. The arbitrators also added that they had not yet deliberated on the merits of the case and that the only decisions Klopfenstein participated in were procedural and in no case did he cast a deciding vote. They also pointed out that no procedural rulings were final. Klopfenstein withdrew from the arbitration panel on April 7, 1976 (Pet. App. A, pp. A4-5; April 7, 1976 Tr. pp. 10, 14-16; April 8, 1976 Tr. p. 52).

On April 8, 1976, the Tamaris and Bache presented extensive arguments concerning whether the arbitration should proceed. After hearing the arguments, the arbitrators decided to proceed. One of the Tamaris then proceeded to testify for the remainder of the hearing (Tr. April 8, 1976, p. 51 *et seq*).

At the start of the May 17, 1976 hearing, the Tamaris announced they would not continue to arbitrate. The only reason they gave was that the panel of arbitrators was allegedly improperly constituted under the submission agreement. The arbitrators advised Tamaris that they had jurisdiction over the matter and would rule on the case. They further stated that they had reached no decision on the merits of the case and that they would take further evidence to satisfy themselves on the

merits. The Tamaris walked out of the proceeding. Thereafter, the arbitrators questioned Mr. Reyes, who worked at Bache's Beruit office, as well as another Bache employee. They also received documentary evidence offered by Bache (May 17, 1976 Tr. p. 5, *et seq*).

On May 19, 1976, the district court entered orders in Tamari I and Tamari II ordering the Tamaris to arbitrate. Tamaris ignored the orders.

On June 21, 1976, the remaining six arbitrators in an unanimous decision entered an award in favor of Bache and against the Tamaris on both Bache's Complaint and Tamaris' Counterclaim (Pet. App. F, ¶ 59; Complaint Ex. Q). On June 28, 1976, the Tamaris appealed the award to the CBOT Committee on Appeals. On January 25, 1977, the Committee on Appeals affirmed the award (Pet. App. F, ¶ 60).

Bache's Motion to Dismiss and the District Court's Order

Bache moved to dismiss Tamaris' complaint for failure to state a claim upon which relief could be granted.

On February 26, 1979, the district court granted Bache's motion and filed a well-reasoned and thorough memorandum opinion (Pet. App. C). The district court held that Fivian's acceptance of employment with Heinhold Company, the employer of arbitrator Klopfenstein, did not suggest partiality on the part of the arbitrators. The district court said (Pet. App. C, p. A18):

> "The relationship between Mr. Klopfenstein and Bache, however, can hardly be considered to be 'more than trivial.' See *Commonwealth Coatings*, 393 U. S. at 152 (White, J., concurring). Mr. Fivian was not a party to the arbitration proceedings and would not appear to have any personal stake in the outcome of the arbitration. The only connection between Mr. Klopfenstein and Bache is that Mr. Klopfenstein's employer hired Bache's employee. We think that

> under these circumstances, nothing more was required than that the relationship between Mr. Klopfenstein and Bache be promptly disclosed to plaintiff. This was done. The arbitrator then withdrew from the panel and did not participate in making the award."

The district court further made an express finding that the arbitration proceedings were fair and impartial. The district court said (Pet. App. C, p. A23):

> "In dismissing plaintiffs' complaint, we would point out that a reading of the transcripts of the arbitration proceeding convinces us that both parties were accorded a fair, impartial and non-arbitrary forum in which to settle their dispute. Giving plaintiffs the benefit of all reasonable inferences, we do not believe their claim can stand in light of the record before us."

On April 10, 1979, the district court entered judgment on Bache's counterclaim and confirmed the arbitration award (Pet. App. D, pp. A25-27).

Tamaris' Motion to Vacate

Thereafter, Tamaris filed a motion to vacate the district court's orders dated February 26, 1979 and April 10, 1979. Tamaris also requested an opportunity to take discovery on the issue of arbitrator bias.

On August 3, 1979, the district court denied Tamaris' motion. The district court concluded that Tamaris were not entitled to discovery concerning Klopfenstein's involvement, if any, in the employment negotiations concerning Fivian, stating (Pet. App. E, p. A29):

> "We believe that whatever the extent of Klopfenstein's knowledge concerning the ongoing employment discussions, his relationship with a party to the arbitration proceedings, Bache, was never more than trivial."

Tamaris appealed the August 3, 1979 order to the court below.

The Decision of the Court Below

On April 25, 1980, the court below affirmed the district court's orders in a unanimous decision written by Circuit Judge Tone (Pet. App. A).

In reviewing the issue of alleged arbitrator bias, the court below adopted the district court's assessment that Tamaris had received a full and impartial hearing on their claim. (Pet. App. A, p. A5). The court also found that there was no appearance of bias. Judge Tone said (Pet. App. A, p. A5-6).

> "We also conclude that, even viewing the complaint in the light most favorable to the Tamaris, no claim has been stated that would warrant relief due to an appearance of bias. Fivian's negotiations with Heinhold were of necessity confidential until an agreement had been reached. When the decision was made, Fivian promptly disclosed it, and the Tamaris were promptly informed by the committee of what had occurred. Klopfenstein offered to withdraw and did withdraw in response to the Tamaris' request. Therefore, even assuming that Klopfenstein might reasonably appear to have had some nontrivial interest in the proceedings because his employer had hired the employee of a party, any appearance of bias was dispelled by the forthright manner in which the situation was handled once it became known. The record of the arbitration hearings, which controls insofar as it is in conflict with plaintiffs' complaint, is similarly devoid of any manifestation of partiality.
>
> It is relevant to the appearance of bias issue as well as the actual bias issue that Fivian was not an occurrence witness but rather Bache's delegate to produce documents and answer questions about the firm's operating procedures. His testimony did not relate to disputed issues of material fact, and the Tamaris have shown no prejudice to them even on the assumption that the arbitrators believed everything Fivian said in his testimony. Moreover, Fivian was negotiating to leave Bache and did so during the period in question. The possibility that Bache might have benefited from any indirect affinity that might have developed

between Fivian and Klopfenstein because of the new employment relationship is so remote that we think no reasonable person would find an appearance of bias in Bache's favor on this account."

The court also considered Tamaris' claim that the arbitrators were biased in determining whether Tamaris had voluntarily submitted to arbitration because they were associated with the CBOT. On this score, Judge Tone said (Pet. App. A, p. A10-11):

"There is no inherent bias or appearance of bias in the arbitration panel simply because its members were drawn from persons in the commodities business. This is implicit in this court's decision in Tamari II; any other view would mean that Tamari II required a futile arbitration process before a panel that would in the end merely be found incompetent to hear the case due to bias or the appearance of bias. It is also to be noted that under the agreement to arbitrate the Tamaris had the choice of submitting to arbitration before either the CBOT or the American Arbitration Association. In addition, correspondence of record indicates that Bache offered the Tamaris a third option, submitting to arbitration before the Board of Governors of the New York Stock Exchange. The Tamaris' election to proceed before the CBOT gives a hollow ring to their argument of inherent bias or the appearance thereof in CBOT arbitrators.

Finally, if it were necessary to go further, we would find no indication in the record of the arbitration proceeding of actual bias on the part of the arbitrators; their decision that the Tamaris voluntarily agreed to arbitrate is reasonable in view of the record. Even if it were assumed that the Tamaris signed the original agreement to arbitrate under duress, because they could not otherwise obtain a commodity customer account with Bache, they did not make a timely assertion of agreement under duress when a dispute over the contract arose. Instead, they again agreed to arbitration by selecting the CBOT forum, by executing a submission to arbitration with Bache, and by actually proceeding to litigate the case before the arbitration committee.

> The committee could reasonably have determined that four agreements to arbitrate were sufficient to demonstrate voluntariness on the part of the Tamaris."

The court below concluded that the complaint was properly dismissed because even viewing the complaint in the light most favorable to Tamaris, no claim was stated. (Pet. App. A, p. A5, A13). In reviewing the complaint, the court below noted that exhibits attached to the complaint controlled inconsistent allegations "as the Tamaris recognize" (Pet. App. A, p. A4). In addition, the court noted Tamaris had a "full opportunity" to explore the Kiopfenstein-Fivian matter in the arbitration proceedings. (Pet. App. A, p. A13).

REASONS FOR DENYING THE WRIT

I

THE DECISION OF THE COURT BELOW ON THE ISSUE OF CLAIMED ARBITRATOR PARTIALITY IS CORRECT AND IN CONFORMITY WITH THE DECISION OF THIS COURT AND OF OTHER COURTS

The primary reason Tamaris advance for granting a writ is that the decision of the court below on the issue of arbitrator partiality is purportedly at odds with this Court's decision in *Commonwealth Coatings Corporation* v. *Continental Casualty Company*, 393 U. S. 145 (1968) and with a decision of the Second Circuit in *Sanko S. S. Co. Ltd.* v. *Cook Industries, Inc.*, 495 F. 2d 1260 (2d Cir. 1973). Tamaris' argument simply ignores that the facts in each of these cases vastly differ from those present here. The decision of the court below is consistent with those cases, and, in fact, is implicitly mandated by *Commonwealth Coatings.*

A. Tamaris' Argument That the Arbitrators Were Partial Because an Arbitrator's Employer Hired a Bache Employee Who Testified at the Arbitration Hearings Lacks Merit

Tamaris first argue that there was an appearance of partiality in the arbitrators because the *employer* of arbitrator Klopfenstein hired Fivian, a Bache *employee* who testified on perfunctory matters at the arbitration hearings. In that regard, the court below noted (i) the possibility that Bache may have benefited from any indirect affinity that might have developed between Fivian and Klopfenstein was so remote that "no reasonable person would find an appearance of bias in Bache's favor on this account"; (ii) when Fivian was hired, the Tamaris were

promptly advised, Klopfenstein offered to withdraw, and the matter was handled in a forthright manner; and, (iii) Klopfenstein withdrew from the panel and did not participate in making the award which was unanimously rendered by the remaining six arbitrators.

Against this record, the court below held that no claim was stated which would warrant relief due to an appearance of arbitrator partiality. In so ruling, the court below was well aware of *Commonwealth Coatings* and *Sanko*. Judge Tone said (Pet. App. A, pp. A6-7):

> "Nothing in *Commonwealth Coatings* or in the other cases relied on by the Tamaris would support a contrary result. These cases involve the failure to disclose relationships that might reasonably give rise to an appearance of partiality; in each of them an arbitrator with a significant connection to a party participated in an award. In the case at bar, the relationship was never significant, and the arbitrator disclosed it at the first opportunity and withdrew."

An examination of *Commonwealth Coatings* and *Sanko* and an examination of the record in this case amptly demonstrates that the court below was preeminently correct.

1. Unlike Commonwealth and Sanko, the Arbitrator Had No Relationship to a Party. If One Existed Here, It Was Trivial at Best

Tamaris' petition mischaracterizes the facts and holding of *Commonwealth Coatings*. In that case, the parties to a dispute each appointed one arbitrator, and those two then selected a third, supposedly "neutral" arbitrator. The neutral arbitrator owned a business and acted as an engineering consultant on construction projects. His relation with the prevailing party in the arbitration was described as follows (393 U. S. at 146):

> "One of his *regular customers* in this business was the prime contractor that petitioner sued in this case. This relationship with the prime contractor was in a sense sporadic

> in that the arbitrator's services were used only from time to time at irregular intervals, and there had been no dealings between then for about a year immediately preceding the arbitration. Nevertheless, the prime contractor's *patronage was repeated and significant,* involving fees of about $12,000 over a period of four or five years, and *the relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit.*" (Emphasis supplied)

This Court held that this arbitrator/party business relation, which was secreted during the arbitration proceedings, gave rise to an appearance of bias. In so holding, Mr. Justice Black, speaking for a plurality of four, said:

> "We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might *reasonably be thought biased against one litigant and favorable to another.*" (Emphasis supplied).

In a concurring opinion, Mr. Justice White, joined by Mr. Justice Marshall, noted that arbitrators were effective because "they are men of affairs, not apart from but of the marketplace." Because of this, arbitrators are not automatically disqualified by an undisclosed relationship with a party before them if ". . . the relationship is trivial. I see no reason to disqualify the best informed and most capable potential arbitrators," 393 U. S. at 151.

In *Sanko,* the plaintiff alleged that the only "neutral" arbitrator on the three man panel failed to disclose two relationships he had with the prevailing party: one, that the arbitrator's company regularly retained the attorney who represented the prevailing party in the arbitration; and two, that the arbitrator's ultimate employer had large scale dealings running into millions of dollars with the prevailing party. The court noted there were contested versions of facts concerning these relationships and directed the district court to hold an evidentiary hearing. In so ruling, the court noted that (495 F. 2d at 1264, n. 3):

> "Whether ties are so indirect or remote that they could not reasonably create an impression of bias is a question that must be answered by reference to the facts of the particular case."

It is readily apparent that the relationship here is vastly different from those present in *Commonwealth Coatings* and *Sanko*. Here, the arbitrator Klopfenstein did not have a "repeated and significant" business arrangement with Bache, nor did he have any personal involvement "on the very (matters) involved in this lawsuit". Klopfenstein, in fact, had no business dealings with Bache; he had no contact whatever with Bache; he had no personal stake or interest in the outcome of the arbitration. Nor did Klopfenstein's employer have any business relationship or contact with Bache.

The only relationship at issue here is that Fivian, a Bache employee who testified on perfunctory matters at the arbitration proceeding, interviewed for a job with the employer of arbitrator Klopfenstein. In so doing, Fivian did not even talk to Klopfenstein. Fivian's interviews were purely personal and solely for his individual concern; they did not involve or contemplate any future business relation between Bache and Klopfenstein or his employer; they were totally unrelated to the subject matter of the arbitration. There is simply no basis to conclude from these particular facts that Klopfenstein "might reasonably be thought biased" against Tamaris and in favor of Bache.

Tamaris urge that the court below adopted a standard with which to evaluate a claim of arbitrator bias, a standard which they claim is at odds with *Commonwealth Coatings*. The standard referred to is that before an award may be set aside on grounds of arbitrator bias, the bias "must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative." This standard is sound and reasonable. It is consistent with the plurality opinion in *Commonwealth Coatings* that before an award may be set aside, there must be a business relation from which an arbitrator "might reasonably be thought

biased" in favor of one party and against the other. It is consistent with Mr. Justice White's concurring opinion in which he made clear that an arbitrator is not automatically disqualified if an arbitrator's "business relationship" with a party is "trivial." It is also consistent with *Sanko's* conclusion that an examination of whether an arbitrator's relation with a party is "indirect or remote" turns on the particular facts of a case.

Moreover, the court below held "no reasonable person would find an appearance of bias", the relationship was "never signficant" and the "possibility of bias was highly speculative." (Pet. App. A, pp. A 6-7). Whatever standard is applied, the result would be the same. No claim has been stated which would warrant relief due to an appearance of arbitrator bias. This result is consistent with, if not mandated by, *Commonwealth Coatings* and *Sanko;* it is supported by numerous decisions of other courts. *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.,* 439 F. 2d 1268, 1275 (2d Cir. 1971); *Andros Compania Maritima S. A.* v. *Marc Rich & Co., A. G.,* 579 F. 2d 691, 697-702 (2d Cir. 1978); *United States Wrestling Federation* v. *Wrestling Division of the A. A. U. Inc.,* 605 F. 2d 313, 318 (7th Cir. 1979); *Isaacson* v. *Hayden, Stone Inc.,* 359 F. Supp. 1050, 1052 (S. D. N. Y. 1973); *Oversees Private Inv. Corp.* v. *Anaconda Co.,* 418 F. Supp. 107, 111 (D. C. 1976); *Ilios Shipping and Trading Corp.* v. *American Anthracite & Bituminous Coal Corp.,* 148 F. Supp. 698, 700 (S. D. N. Y. 1957).

2. Unlike Commonwealth Coatings and Sanko, the Relation at Issue Here Was Promptly Disclosed

In *Commonwealth Coatings,* Mr. Justice Black said (393 U. S. at 147-8):

> ". . . we have no reason, *apart from the undisclosed* business relationship, to suspect him (the arbitrator) of any improper motive. But neither this arbitrator nor the prime contractor gave to petitioner even an intimation of the close financial relations that had existed between them for a period of years." (Emphasis supplied)

Arbitrator bias thus reasonably appeared in *Commonwealth Coatings* because the business relationship was concealed throughout the arbitration proceedings. Similarly, there was no disclosure in *Sanko*.

Here, Fivian was hired by arbitrator Klopfenstein's employer on March 16, 1976. Bache was advised on March 29, 1976. The arbitrators, without exception, were advised on April 7, 1976. The arbitrators promptly advised the parties of the matter at the April 7, 1976, hearing which was the first hearing after the hiring took place. Mr. Klopfenstein volunteered to withdraw. The arbitrators offered both Bache and Tamaris an opportunity to ask whatever questions they desired concerning the matter. Mr. Klopfenstein withdrew at Tamaris' request and did not thereafter participate in the taking of evidence or in making the award.

The six arbitrators handled the matter properly and fairly, and having done so the award may not be set aside. *Reed & Martin Inc.* v. *Westinghouse Electric Corp.*, 439 F. 2d 1268, 1275 (2d Cir. 1971).

3. Unlike Commonwealth Coatings and Sanko, the Challenged Arbitrator Here Withdrew and Did Not Participate in Making the Award

Klopfenstein withdrew as an arbitrator on April 7, 1976, and he did not participate in the arbitration hearings thereafter had, nor in the making of the award. The arbitration award was unanimously made on June 21, 1976 by the remaining *six* arbitrators (Pet. App. F, ¶ 59; Complaint, Ex. Q). There is thus no basis to claim that the *award* is tainted by evident partiality or corruption of the arbitrators.

Moreover, it should be noted that procedural decisions made during the course of the arbitration were not tainted in any way. The arbitrators had not discussed Fivian's testimony, had not made any decisions based on Fivian's testimony, and Klopfen-

stein had not influenced any arbitrator with respect to Fivian's testimony. In addition, the arbitrators had not yet deliberated on the merits of the case; the only decision Klopfenstein participated in were procedural, and, in no case did he cast a deciding vote. At the time Klopfenstein withdrew, no procedural decisions were final. The record thus does not even permit an inference that procedural decisions were tainted.

B. Tamaris' Argument That the Arbitrators Had a Vested Interest in Determining Whether They Voluntarily Submitted to Arbitration Lacks Merit

Tamaris also argue that the arbitrators were biased in deciding whether Tamaris submitted to arbitration voluntarily. Tamaris cite CFTC Reg. 180.3 as support for their proposition that the commodity futures industry has a vested interest in compelling arbitration. From there they argue that the arbitrators here, who were associated with the CBOT, had this purported vested interest. Tamaris' argument lacks merit for a number of reasons, any one of which requires its rejection.

1. Tamaris' Argument Is Not Supported by Allegations of the Complaint and Was Not Raised in the District Court

The complaint does not allege that the arbitrators were partial because they had a vested interest in compelling arbitration, nor did Tamaris argue this in the district court. The argument may not be raised here. *Usery* v. *Turner Elkorn Mining Co.*, 428 U. S. 1, 37 (1976); *Weade* v. *Dichmann, Wright & Pugh*, 337 U. S. 801, 808 (1948).

2. Tamaris' Argument Is Barred by Res Judicata

Tamaris' argument that the arbitrators were partial in deciding whether they voluntarily submitted to arbitration was finally adjudicated in Tamari II (Pet. App. G). In that case, Tamaris argued that the provisions requiring arbitration in their

customers' agreement were invalid as adhesion contracts and invalid under provisions of the Commodity Exchange Act, as amended, and under CFTC Reg. 180.3. They also argued that their submission to arbitration was involuntary. The Seventh Circuit rejected those arguments and held that the Tamaris were required to arbitrate before the CBOT. The Seventh Circuit thus adjudicated that the agreement for arbitration was not tainted by fraud or coercion, that the arbitrators were qualified to decide the case and implicitly held that the arbitrators were not inherently biased simply because they were associated with the CBOT (Pet. App. G, pp. A62-67).

Tamaris are now barred from relitigating the matter on theories which were raised or which could have been raised in Tamari II. *Commissioner of Internal Revenue* v. *Sunnen,* 333 U. S. 591, 597 (1948), *Angel* v. *Bullington,* 330 U. S. 183, 193-4 (1946).

3. Tamaris Waived Any Purported Partiality

The crux of Tamaris' argument is that the arbitrators were partial not because of a relation with Bache, but because of their association with the commodities industry. The overriding flaw in this argument is that Tamaris knew all along that an arbitration before the CBOT would be conducted by arbitrators associated with the commodities industry. Mr. Justice White's concurrence in *Commonwealth Coatings* makes clear (393 U. S. at 150):

> "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance."

Here, Tamaris knew in advance of the arbitrator's relationship they now belatedly claim evidences partiality. There is no basis under *Commonwealth Coatings* to disqualify the arbitrators on this ground. Accord: *Reed & Martin Inc.* v. *Westinghouse Electric Corp.*, 439 F. 2d 1268, 1275 (2d Cir. 1971);

Garfield & Co. v. *Wiest*, 432 F. 2d 849, 853 (2d Cir. 1970) *cert. denied* 401 U. S. 940 (1971); *Andros Compania Maritima S. A.* v. *Marc Rich & Co., A. G.*, 579 F. 2d 691, 701 (2d Cir. 1978).

The Tamaris not only knew that the arbitrators were associated with the commodities industry, but the Tamaris themselves in fact *elected* to arbitrate their claim before the CBOT. The Tamaris had the option of electing to arbitrate any dispute with Bache before the American Arbitration Association *or* the exchange on which the trades giving rise to the dispute were made. After the dispute arose, Bache asked Tamaris to choose between the American Arbitration Association or the New York Stock Exchange. Tamaris informed Bache "we accept arbitration in accordance with the terms of the customer agreement . . . we request that the arbitration should take place in accordance with the rules of exchange where our commodities transactions took place namely the Chicago Board of Trade."

Subsequently, on April 27, 1974, Tamaris executed an arbitration submission agreement in which they again agreed to arbitrate before the CBOT; on September 17, 1974 they filed an answer and counterclaim in the CBOT arbitration proceedings; later they participated in procedural discovery and evidentiary hearings in connection with the arbitration. The record discloses that Tamaris not only knew the arbitrators were associated with the CBOT, but that they, not *Bache*, elected to arbitrate before the CBOT. As the court below noted:

> "There is no inherent bias or appearance of bias in the arbitration panel simply because its members were drawn from persons in the commodities business. This is implicit in this Court's decision in *Tamari II;* any other view would mean that *Tamari II* required a futile arbitration process before a panel that would in the end merely be found incompetent to hear the case due to bias or the appearance of bias. It is also to be noted that under the agreement to arbitrate the Tamaris had the choice of sub-

> mitting to arbitration before either the CBOT or the American Arbitration Association. In addition, correspondence of record indicates that Bache offered the Tamaris a third option, submitting to arbitration before the Board of Governors of the New York Stock Exchange. The Tamaris' election to proceed before the CBOT gives a hollow ring to their argument of inherent bias or the appearance thereof in CBOT arbitrators." (Pet. App. A, pp. A10-11)

Tamaris now claim that they attended the arbitration hearings only after they filed a lawsuit against Bache on December 10, 1975. This, however, does nothing to unravel and render void some four agreements to arbitrate (including several post-dispute agreements to arbitrate), entered into more than a year earlier.* Tamari I and Tamari II so held. Moreover, the day after Tamaris filed their first lawsuit against Bache, Tamaris' counsel said at the arbitration hearings (December 11, 1975 Tr. pp. 17-18 and 22):

> "In response to Mr. Giambalvo, with respect to the request for arbitration, his original request for arbitration to the Tamaris was that it be held before either the New York Stock Exchange Arbitration Committee or the American Arbitration Association. We responded that it should be held before the Chicago Board of Trade Arbitration Committee. That was our request.
>
> * * *
>
> "I have no feeling about this Arbitration Committee that it wouldn't give a fair hearing on this. I don't have any problem with that at all. As a matter of fact, this was the forum that I originally selected, that my clients selected when Mr. Giambalvo's client was suggesting that it be the New York Stock Exchange or the American Arbitration Association."

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* Section 2 of the United States Arbitration Act provides that a written provision for arbitration ". . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract", 9 U. S. C. § 2.

Tamaris' belated argument that they did not waive any claimed partiality that may have arisen by reason of the arbitrators' association with the CBOT is belied by the record.

4. An Appearance of Partiality Cannot Be Inferred from the History of Commodities Futures Trading Commission Regulation 180.3

Tamaris urge that an inference that the arbitrators were partial in deciding whether Tamaris voluntarily submitted to arbitration may be drawn from the history of CFTC Reg. 180.3. This argument lacks merit for a number of reasons.

First, CFTC Reg. 180.3 does not suggest or infer in any way that arbitrators associated with a commodities exchange might be partial. Any such notion is dispelled by the fact that the Commodity Exchange Act, as amended, requires commodity exchanges to provide a procedure through arbitration or otherwise to settle customer claims, 7 U. S. C. § 7(a)(11). Congress has thus concluded that a commodity exchange can fairly and impartially resolve customer disputes through arbitration.

Secondly, CFTC Reg. 180.3 pertains only to pre-dispute agreements to arbitrate and it was adopted out of a concern that unsophisticated persons might not understand the import of an arbitration clause; it has no application whatever to agreements to arbitrate entered into *after* a dispute has arisen. Here, Tamaris are sophisticated businessmen, engaged in the business of importing and wholesaling food products in international commerce. Furthermore, with the benefit of advice from their attorneys they agreed to arbitrate on several occasions *after* their dispute with Bache arose and they elected to arbitrate before the CBOT. As Circuit Judge Tone held (Pet. App. A, p. A11):

> "Finally, if it were necessary to go further, we would find no indication in the record of the arbitration proceeding of actual bias on the part of the arbitrators; their

> decision that the Tamaris voluntarily agreed to arbitrate is reasonable in view of the record. Even if it were assumed that the Tamaris signed the original agreement to arbitrate under duress, because they could not otherwise obtain a commodity customer account with Bache, they did not make a timely assertion of agreement under duress when a dispute over the contract arose. Instead, they again agreed to arbitration by selecting the CBOT forum, by executing a submission to arbitration with Bache, and by actually proceeding to litigate the case before the arbitration committee. The committee could reasonably have determined that four agreements to arbitrate were sufficient to demonstrate voluntariness on the part of the Tamaris."

CFTC Reg. 180.3 thus has no application here. This is particularly so in light of the fact that Tamari II held that the regulation did not preclude the arbitration and further held that Tamaris were required to arbitrate before the CBOT.

Thirdly, CBOT Rule 183 provides that "[T]he policy of the Association is to encourage, but not to compel, the arbitration of disputes." In light of this, there is no basis whatever to infer that the arbitrators were predisposed to hold that Tamaris had voluntarily submitted their dispute to arbitration.

Finally, it should be noted that Section 2 of the Arbitration Act provides that a written provision for arbitration ". . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract", 9 U. S. C. § 2. Tamari II adjudicated that there were no grounds upon which the arbitration agreement could be revoked and held that Tamaris were required to arbitrate. In light of Tamari II, it is altogether unclear what remained for the arbitrators to decide on any issue of voluntariness and whether it is an issue of any legal consequence.

II.

TAMARIS' ARGUMENT THAT THE COURT BELOW SO DEPARTED FROM ACCEPTED COURT PROCEDURES IN DISMISSING THEIR COMPLAINT FOR FAILURE TO STATE A CLAIM AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION LACKS MERIT

Tamaris argue that the holding of the court below is premised on findings which are inconsistent with well-pleaded allegations of the complaint. Tamaris urge that the court below should not have accepted as true Fivian's statement that he did not talk to arbitrator Klopfenstein and Vanasco's statement that the arbitrators assured themselves no prejudice would occur if the arbitration proceeded.

Tamaris also claim that the court below somehow erred in holding that nothing in the record showed bias or prejudice resulting from Bache's hiring of the CBOT Secretary during the arbitration proceedings. The argument here seems to be that Tamaris might be able to bolster a concededly deficient complaint.

Tamaris' argument concerning the construction of their complaint lacks merit for a number of reasons, any one of which standing alone requires its rejection.

A. The Court Below Concluded Tamaris Failed to State a Claim Viewing the Allegations Most Favorably to Tamaris

The court below was well aware of the rule to be applied in examining the sufficiency of pleadings on a motion to dismiss. The court stated "even viewing the complaint in the light most favorable to the Tamaris, no claim has been stated that would warrant relief due to an appearance of bias" (Pet. App. A, p. A56). Tamaris' suggestion that the court below ignored this principle in rendering its decision is unfounded.

B. It Is Settled Law That an Exhibit to a Complaint Controls Inconsistent Allegations

Mr. Fivian was sworn in under oath at the arbitration hearings. On April 7, 1975, Tamaris' counsel asked him:

> Q. "Did you have any conversations with Mr. Klopfenstein during this period of negotiations?"
> A. "No."

The arbitration transcripts were attached to Tamaris' complaint as an exhibit and were incorporated by reference. Under Rule 10(c), Federal Rules of Civil Procedure, they became a part of the complaint for all purposes. Under settled law, they control inconsistent allegations of the complaint, a principle Tamaris conceded in the court below. *In re Woodmar Realty Co.*, 294 F. 2d 785, 788 (7th Cir. 1961), *Associated Builders Inc.* v. *Alabama Power Company*, 505 F. 2d 97, 100 (5th Cir. 1974); *Olpin* v. *Ideal National Insurance Company*, 419 F. 2d 1250, 1255 (10th Cir. 1969), *cert denied*, 397 U. S. 1074 (1970). This rule is particularly applicable here in light of the facts that (i) Fivian's statement was made after he was sworn in under oath at the arbitration hearings, (ii) Tamaris had a full opportunity to examine him, and (iii) the inconsistent allegations of the complaint are vague and conclusory.

The same applies to Vansasco's statement that the Committee assured itself that no prejudice would occur if the arbitration proceeded. This statement was made in the context of other specific statements by Vansasco and the chairmen of the arbitration panel, none of which are inconsistent with well-pleaded allegations of the complaint (Pet. App. A, pp. A4-5). Even assuming an inconsistency, the court below could properly take Vansasco's statement into account in concluding that the complaint failed to state a claim of arbitrator bias.

C. The Holding of the Court Below Does Not Turn on the Findings Tamaris Complain of

Tamaris erroneously assume that Fivian's statement that he did not talk to arbitrator Klopfenstein is a pivotal issue to the holding of the court below. Tamaris ignore that even assuming Fivian had talked to arbitrator Klopfenstein, arbitrator Klopfenstein's relation with Bache would still be trivial at best. The district court concluded that:

> "whatever the extent of Klopfenstein's knowledge concerning the ongoing employment discussions, his relationship with a party to the arbitration proceedings, Bache, was never more than trivial."

Similarly, the court below held whatever affinity might have developed between Klopfenstein and Fivian, no reasonable person would find an appearance of bias in favor of Bache on this account (Pet. App. A, p. A6). Further, the court below, noted that Fivian's hiring was promptly disclosed, and that arbitrator Klopfenstein immediately withdrew and did not participate in making the award. The holding of the court below concerning the issue of arbitrator bias is thus supported by a number of grounds and does not turn on whether Fivian talked to Klopfenstein.

Likewise, Tamaris suggest that Vanasco's statement was the sole basis in the record to conclude that Tamaris received a fair and impartial arbitration hearing. Here, Tamaris ignore that that decision of the court below also quotes statements of Chairman Newman in this regard, none of which are challenged by Tamaris. Tamaris also ignore the fact that the court below adopted the assessment of the district court, which was based on a review of all the arbitration transcripts of proceedings, that Tamaris "were accorded a fair, impartial and non-arbitrary forum" (Pet. App. A, pp. A4-5).

Finally, the court below rejected Tamaris argument concerning Bache's hiring of the CBOT Secretary on a series of grounds which Tamaris choose to ignore (Pet. App. A, pp. A7-9).

D. The Dismissal of Tamaris' Complaint Did Not Depart from the Accepted and Usual Course of Judicial Proceedings

The court below correctly noted that a court's power to vacate an arbitration award is limited to the grounds set forth in 9 U. S. C. § 10 (Pet. App. A, p. A2, n. 2). In reviewing the complaint, it viewed the allegations most favorably to Tamaris. In treating exhibits to the complaint as controlling over inconsistent allegations, it did so in light of prior authority and upon Tamaris' recognition of the well-settled rule in the court below. Furthermore, Circuit Judge Tone specifically noted that Tamaris had a full opportunity to develop facts relative to the Klopfenstein/Fivian matter (Pet. App. A, p. A4).

The court below acted correctly with respect to the matters Tamaris raise here. Its holding is supported on numerous grounds independent of those grounds Tamaris urge here. It did not so depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

III

THE ISSUES RAISED ARE BARRED BY RES JUDICATA AND WAIVER

As noted above, pp. 20-1, Tamari II has finally adjudicated issues raised in Tamaris' petition.

In addition, after Tamaris began to present evidence in support of their counterclaim at the arbitration proceedings, they walked out of the proceedings. The only reason assigned for their walk-out was that the panel was illegally constituted. Nothing was said concerning arbitrator bias (May 17, 1976 Tr. p. 5). Having premised their walk-out on that reason, Tamaris waived all other claims including any claim of evident partiality in the arbitrators.

As stated by this court in *Ohio & Mississippi Railway Company* v. *McCarthy*, 96 U. S. 258, 267-8 (1878):

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot after litigation has begun, change his ground, and put his conduct upon another and a different consideration."

Tamaris' petition should be denied because the issues they raise are barred by *res judicata* and waiver.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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